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SUPPLEMENT — IMPORTANT TEXTS OF AN INTERNATIONAL CHARACTER:

THE AMERICAN JOURNAL OF INTERNATIONAL LAW is supplied to all members of the American Society of International Law without extra charge, as the membership fee of five dollars per annum includes the right to all issues of the JOURNAL published during the year for which the dues are paid.

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A • COMPARATIVE STUDY OF THE SOUTH AFRICAN CONSTITUTION

The self-governing colonies of the British Empire are not, it is true, states within the meaning of international law, for Great Britain has, among other things, the legal right to conclude with other nations treaties which affect her colonies. It is, moreover, too much to say that the self-governing colonies will become members of the family of nations. Still it is a fact that England has in recent years granted them more or less participation in the negotiation of treaties affecting their welfare; and in a recent treaty of general arbitration Great Britain expressly reserves "the right before concluding a special agreement in any matter affecting the interest of a self-governing Dominion of the British Empire, to obtain the concurrence therein of the Government of that Dominion."¹ Consequently these colonies possess a certain standing in international relations which can not be overlooked, and which justifies some comparative study of their fundamental laws. The object of this paper is, therefore, to give a general sketch of the constitution of South Africa, recently approved by the English Parliament, in the light of the earlier constitutions similarly granted to Canada and Australia.

That part of South Africa under British control today comprises the self-governing colonies of the Transvaal, Natal, Cape Colony, and the Orange River Colony, together with Rhodesia, administered by the British South African Company, and the native territories under the control of the crown, viz., Basutoland, Swaziland, and Bechuanaland. These are the districts affected by the South African constitution. The colonies themselves are said to have a population of 6,130,000, of which 1,130,000 are Europeans, chiefly English and Dutch. Though these colonies are not separated by natural

¹ Arbitration Convention between the United States and Great Britain, signed April 4, 1908, Art. II.

barriers, yet in years past some of them have been petty states under other than the British flag.

After a Portuguese sailor, imbued with the adventurous spirit of Prince Henry, discovered the Cape of Good Hope in the year 1486, little attention was paid to the place by other countries except to make it a port of call on the route to and from the East. The first actual settlement was made in the year 1652 by the Dutch who, except for four years of English domination, held control until about the beginning of the nineteenth century. Finally, on January 10, 1806, as a result of the Napoleonic wars, the Cape capitulated to Great Britain and passed once for all under English rule.²

The Dutch in the Cape grew restless under British rule and the distasteful British taxes. Consequently, in 1837, in order to escape their burden of troubles, about 6,000 of the Dutch inhabitants emigrated to what is now a part of Natal. Many of them had already entered the territory between the Orange and Vaal rivers (part of what is now the Orange River Colony) but the Queen's sovereignty was proclaimed over this area in 1848, and the Boers were compelled to trek sorrowfully across the Vaal River.

The British position in South Africa, however, was fast becoming uncomfortable. The Cape Colony officials were engaged in repressing native attacks in addition to smothering the rebellious Boer trekkers. At length considering that the latter task was not worth the cost and that the country was worthless anyhow, a compromise seemed desirable and by an agreement ever after known as the "Sand River Convention," the independence of the Boers in the South African Republic beyond the Vaal River was recognized January 17, 1852. On similar considerations Her Majesty's Government withdrew from the territory between the Orange and Vaal rivers, and on February 23, 1854, signed a convention at Bloemfontein which transferred the government to the Orange Free State.

During this generous period the home government, in April 1853, granted Cape Colony a parliament with representative government,

² It is said that by the treaty of Vienna, 1815, England formally purchased the Cape from Holland for £8,000,000. Memorandum on the Federation of the South African Colonies, by Lord Selbourne, p. 15.

which was supplemented in 1872 by responsible government. Finally in 1856, Natal was given a new constitution and a legislative council elected by the people.

• The non-tax-loving Boers kept the treasury of the South African Republic in a constant state of depletion. Consequently, dissensions among its people were rampant, sometimes ending in civil war.

None know better than the natives when opportunities exist and the British authorities saw with grave apprehension an impoverished and badly governed state seriously threatened by the greatest savage power in South Africa. White inhabitants called out for speedy protection, and Lord Carnarvon, then Secretary of State for the Colonies, thought it wise to send Sir Theophilus Shepstone from Natal as a Special Commissioner, empowered, with the approval of the High Commissioner, to annex any territory he might think fit to the British dominions. * * * As it was, we merely entered their country, took for granted what should never have been taken for granted — that is, the wishes of the mass of the people — and pensioning off the chief officials, declared that there was an end of that system of government for which the Voortrekkers had fought, and which was almost as dear as life to their descendants.³

At length, the indiscretions of the English administrator of the Transvaal drove the Boers to appoint a triumvirate to carry on the government and to drive out the British. After some engagements in which the Boers were in general victorious, a convention was signed at Pretoria, October 25, 1881, which gave the Transvaal complete self-government subject to the suzerainty of the Queen. Finally, in 1884, England abandoned all control over internal affairs and reserved only the right to veto treaties except those made with the Orange Free State. It was, however, distinctly agreed between the English commissioners and the Boer representatives that Englishmen and burghers in the Transvaal were to have substantially equal political rights, including that of the franchise.

At this time a white man was entitled to the franchise after a residence of one year. The influx of Englishmen, however, after the discovery of gold in the Transvaal and diamonds at Kimberly, resulted in the period of residence being gradually lengthened by the Boers to 14 years. And taxes on the mining companies were made

³ A. Wilmot, *Manual South African History*, pp. 126, 127.

iniquitously heavy, amounting to thirty and even fifty per cent of the output. The capitalists, driven to desperation, planned to overthrow the Transvaal Government by force. The result was the Jameson raid which caused the Boers to pronounce the doom of British rule in South Africa. Arms and war supplies, which had long been quietly gathering, poured into the Boer republics in increasing streams. Rumors of war were on every hand.

A conference called at Bloemfontain in 1899, failed to come to an agreement on the question of the franchise, and after temporising for some time the South African Republic directed an ultimatum to the Queen, October 9, 1899, requiring the withdrawal of her troops from the border. Shortly afterward, war was declared by the South African Republic.

The progress of the Boer war is yet too familiar to call for recounting here. In May, 1902, the Boers finally submitted, receiving honorable terms but renouncing independence, and the annexed Orange Free State and South African Republic became the crown colonies of Orange River and Transvaal with appointive legislative councils.⁴ In 1906 England granted these colonies liberal responsible governments which were wisely and creditably handled, and to this generous act of the victors is attributed the rapid reconciliation which has manifested itself between the colonies and the races in South Africa.

The advent of a new constitutional government, such as the South African Union, is sufficient excuse perhaps to pause and briefly review past similar events. A fundamental constitutional law which was to be unalterable is an old idea. Cromwell is credited with saying that there must be a fundamental law beyond the power of Parliament to control. But John Lilburne may be called the father of the written constitution; for in 1648-1649 he drew up a constitution and presented it to the Parliament of England for adoption by the people, not by Parliament. In 1653 Cromwell declared the "Instrument of Government," but it lasted only a short while and did not rest on the approval of the people. The United States, however,

⁴ The main points in this historical sketch are taken from *Manual of South African History*, by A. Wilmot, supplemented from various sources.

may claim to be the birthplace of the first written constitution which was popularly adopted. The plantations of Wethersfield, Windsor and Hartford sent male adults to an assembly which in 1638 drafted a document called the "Fundamental Orders of Connecticut." This is said to mark the birth of a government under a written constitution, that is, the first plan of government by law alone without rulers and with the acceptance of the people. The "Fundamental Orders" contained eleven articles, did not recognize the King of England, and was supreme over the three plantations.⁵ The people, however, did not really denounce allegiance to England. Moreover, in 1662 the crown granted a royal charter to Connecticut which affirmed the "Fundamental Orders" and thus detracted from its true constitutional value. The "Mayflower Compact" recognized the King and contained no plan of government; nor was the ordinary colonial charter a constitution in a democratic sense. In 1776 all of the American colonies adopted real constitutions, if nothing more than the old charters with a new meaning. In 1787 the American constitution was framed and a few years later, 1791, the Poles drafted a constitution, which was scarcely put in force. At about the same date, 1790-1791, France adopted the first constitution on the continent and since that time there have been many in various parts of the world.

In connection with the colonial constitutions granted by Great Britain, it may be recalled that the fundamental principles said to underlie a written constitution are that it is superior to an act of legislation contrary to it and to the constitution of a political district, such as a State or province, under the central government, and that it derives its power from popular adoption. Where the power to declare an act void shall lie is largely a matter of expediency. The American constitution is believed to be the first instance in the world where this power is given to a coördinate branch of the government, namely, the courts. On the other hand, in Switzerland and some other continental countries, this power is given to the legislature. The fundamental laws under which the self-governing colonies of England move and have their being are in truth statutes drawn up

⁵ H. Doc. No. 357, 59th Cong. 2d sess., p. 519.

perhaps in the colony but enacted into law by the British Parliament in the same manner as any other bill. The first constitution of this nature granted to an English colony is probably the "Constitutional Act" of 1791 for Upper and Lower Canada, now Ontario and Quebec, respectively. It provided for a governor and a legislative council chosen by the King and a legislative assembly elected by the people. Friction resulted between the two legislative bodies over control of the revenue in a manner almost identical with the conflict in Porto Rico during the past year. Rebellion followed and ended in the suspension of the constitution for three years. At this time Lord Durham was appointed governor-general and his report on existing conditions is now a classic on colonial government. On this report was based the Union Act of 1840, which provided for a governor-general, a legislative council appointed by the governor and a legislative assembly elected by the people. In the hands of the latter body was placed entire control of the funds save certain fixed charges. Responsible government was not expressly granted in the act, but was introduced in practice, so that finally, 1847, both legislative bodies were responsible to the people. The other colonies of Canada were likewise given responsible government. Gradually a sentiment for union, having its origin in Nova Scotia, grew up among the colonies, and a conference was called at Quebec where "seventy-two" resolutions were drawn up. These were adopted by the legislatures of Canada, New Brunswick and Nova Scotia, and in 1867 their delegates met in London, and incorporated the resolutions into the bill which passed the British Parliament in 1867 as the British North America Act. This has been supplemented by three other acts: the British North America Act, 1871, the Parliament of Canada Act, 1875, and the British North America Act, 1886. These four acts comprise the fundamental law of Canada.

In Australia the first movement for union occurred in 1850 when a scheme for uniformity of tariffs was proposed but failed. Efforts, however, to mitigate the evils arising from conflicting tariffs and colonial duties were continued and resulted in many attempts to establish treaties, commercial reciprocity, free trade, or customs unions. But up to 1883 every plan had failed altogether, though

some manner of uniform legislation in the various colonies had been secured by colonial conferences which drafted bills to be enacted by each colony. No common ground, however, had been found as a basis for a political union. In 1883, German designs on New Guinea and French fascination for the New Hebrides, led the colonists to consider federation as a means of resisting these aggressions. The completion of an intercolonial railway at this time also suggested closer union. Consequently, a convention in 1883 adopted a plan for a federal council which was accepted by England in 1884. This council, however, was only an advisory body to suggest legislation but without authority to compel the acceptance of its recommendations. At length the recognized need of a national system of defense led to the framing of a genuine federal constitution in 1891. Owing to a financial depression and a political distrust the plan was dropped for a time, though meanwhile, federal sentiment was gaining strength. In 1897, a duly constituted convention met, drafted a new constitution and submitted it to the colonies for suggestions. In the light of new views it was redrafted in 1897 and 1898 and in the latter year was accepted in referendum by the people, save in New South Wales. A conference of premiers in 1899 adjusted the differences by slight amendments and the draft, again submitted to referendum, was accepted by all the colonies. It finally passed the British Parliament, January 1, 1901, as the Commonwealth of Australia Constitution Act.⁹

In South Africa the first practical suggestion of a union of the colonies is accredited to Sir George Grey, governor and high commissioner in South Africa, who wrote to Sir E. B. Lytton in March, 1857, that "by a federal union alone the South African Colonies can be made so strong and so united in policy and action that they can support themselves against the native tribes." Holding him in unhesitating confidence, the Volksraad of the Orange Free State in the following year passed a resolution "that a union or alliance with the Cape Colony either on a plan of federation or otherwise, is de-

⁹ The foregoing sketch of constitutional history is based on Munro, *Constitution of Canada*; Quick and Garran, *Constitution of Australia Commonwealth*, and other sources.

sirable," and suggested a conference of two deputations who "shall draft the preliminary terms of such a union to be submitted for the approval of both governments." The resolution was submitted to the legislature of Cape Colony by Sir George Grey, but before further steps were taken, the movement was crushed by Lytton, who informed Grey that "Her Majesty's Government were not prepared to depart from the settled policy of their predecessors by advising the resumption of British Sovereignty in any shape over the Orange Free State." As a result the four territories remained under separate governments and as Lord Selbourne points out, it was inevitable that different policies, laws and traditions, peculiar to each should have sprung up "like walls of a partition where nature had built no such walls, to divide the one from the other." Events elsewhere led to the next effort at union in South Africa. The Canadian colonies were in perpetual conflict and began to realize that while they had provincial autonomy, this did not allow them to settle intercolonial matters, which, after all, were the most important to their welfare. This was solved so successfully by the Canadian union that Lord Carnarvon, in 1876, attempted to force a similar plan on South Africa. The scheme not having a South African origin, the Cape failed to support it, but the Imperial Parliament nevertheless passed an act enabling the South African governments to unite in a confederation whenever they saw fit. No attempt, however, was made to avail themselves of this act and it expired by limit in 1882. The discovery of diamonds and gold in the eighties soon led to rivalry of the various railroads, which, save those in the Transvaal, were owned by the colonies, for the traffic of the tremendously rich mining districts.⁷ Of course, the larger part of the traffic went to railroads offering the best rates. For a time Cape Colony, by throwing a line across the Orange Free State under agreement, controlled the situation. But the Transvaal and the Portuguese colony on the east linked together their lines and formed an all-rail route from Delagoa Bay, the nearest seaport, to the mining districts. Ever

⁷ Memorandum on the Federation of the South African Colonies, by Lord Selbourne, p. 17.

afterwards it was a contest between the other colonies to overcome this disadvantage. The matter was never satisfactorily settled by conferences, because the railroads, being chiefly colonial concerns, were actuated by local interests. The customs duties imposed by the coast colonies were another source of discontent with the inland colonies of the Transvaal and the Orange Free State. This likewise led to many conferences and at times to partial customs unions, but the question was never satisfactorily determined, for the decisions of the conferences had to be ratified by each of four legislatures before they became effective. Besides these obstacles to commercial development, there were others less obvious but perhaps equally strong. Thus the confusion of the law due to independent legislatures and courts in the various colonies, with no central body, save the Privy Council, to bring about uniformity and coherence, hindered free intercourse. Furthermore the control of the natives, being distributed among the colonies, was weakened and their civilization retarded by the application of different methods. Consequently, the labor supply was aborted. Finally, the uncertainty resulting from these conditions dissuaded the conservative investor and the capitalist. Realizing these difficulties the governor of Cape Colony invited the high commissioner to review the general situation in South Africa and to consider the advisability of establishing a central national government. In reply Lord Selbourne submitted in January, 1907, his admirable "Memorandum on the Federation of the South African Colonies," which was the next important step toward unification.

Following this, a conference of the governments of the colonies was held at Pretoria, in May, 1908, to amend the existing customs and railway-rate conventions. Unable to agree to any changes, the conference agreed to the old conventions and passed the following resolution which was the first practical step toward union:

In the opinion of this Conference the best interests and permanent prosperity of South Africa can only be secured by an early union under the Crown of Great Britain of the several self-governing colonies.

- This resolution was adopted by each parliament, and delegates were appointed by the parliaments to draft a constitution. The delegates, thirty-three in all, the Cape sending twelve, Transvaal eight, Natal

five, Orange River Colony five, and Rhodesia three by invitation and without power of voting, met at Durban, Natal, October 12, 1908. The Chief Justice of Cape Colony, Sir Henry de Villiers, was elected president of the convention which carried on its sessions in strict secrecy. A squadron of British warships under Sir Percy Scott opportunely visited Durban harbor and impressed South Africans that their protection from external dangers depended on His Majesty's forces. On account of the heat the convention adjourned November 5 to Cape Town where sessions were resumed November 23 and continued until the adjournment for the Christmas recess. At that time the delegates spoke of the striking mutual esteem which existed between the Boer and the British members, not one disagreeable incident, it was said, having happened during the whole convention. The convention reassembled January 11, 1908, and held the last sitting February 3. Then the draft constitution was published and laid open to criticism and suggestions. The delegates went home to explain the measure and to try, if possible, to obtain its acceptance without amendment; for though none was entirely satisfied with the measure, all realized that it was the best plan possible for ten years to come and believed it fair all around. It was explained that the draft was a delicately constructed compromise which would require little change to make it unacceptable to some of the colonies, but that the compromise was necessary in order that the draft might receive the unanimous approval of the delegates. The effect of this attitude may be seen in many clauses, but none shows it more strikingly than that on the divided capital. It was said that the property holders of Pretoria denounced Generals Botha and Smuts for losing the capital to that city. The Generals replied that they believed Pretoria would be the ultimate capital as the growth of the country would be northward, and that disunion meant strife and dissension and probably interference by England to set her house in order. The Dutch, however, were pleased with the provision for the absolute equality of the Dutch and English languages. To the press of South Africa and the commercial classes the draft was generally satisfactory. The Cape Colonists criticised the low representation accorded them and the

"European descent" test for members of parliament; while Natal deprecated the facility of amendment whereby the powers reserved to the provinces might be eliminated and their entity lost. Natal also feared that Dutch domination would manipulate railway rates to the disadvantage of the coast provinces. The Transvaal and the Orange River parliaments, however, passed the draft without a single alteration.

When the discussion of the draft constitution appeared exhausted, the second national convention assembled at Bloemfontein, May 3, 1909, in order to redraft the constitution in the light of the desired alterations. The revised draft was then submitted to the colonies. On June 2, the Transvaal and the Orange River Colony, by their legislatures, adopted the measure unanimously, and Cape Colony by a vote of 98 to 2. Natal alone stood out, believing, it is reported, that her refusal to join would disrupt the union and that hence she would be granted better terms to come in. Moreover, she strongly disliked the Mozambique treaty whereby half of the through traffic to the Rand was secured to Delagoa Bay. She finally, June 10, took a referendum on the draft act and carried it by a vote of over 3 to 1. Rhodesia also favored union and may enter in the future, but for the present she prefers to continue development under the management of the British South Africa Company. When the charter of this company expires she will become a crown colony and an arrangement for her entrance into the union will then probably be made between the Union Government and the King.

The draft constitution having been accepted by the colonies, a delegation of nineteen members was named to carry the measure to England and see it through the Imperial Parliament. Australia likewise sent a delegation to Great Britain in 1900, but it contained only six members. The size of the South African delegation, therefore, is some indication of the unanimity of feeling throughout the colonies. Since the president of the convention had consulted Lord Selbourne on every point in order to obtain the ideas of the Imperial Government, the delegation believed there was no reason to anticipate serious amendment by the Imperial Parliament. Consequently, the delegates left for England in July with no authority to agree to amendments of principle. In conference with the Colonial Office,

however, some slight changes in the draft were made. Thereupon it was submitted to the House of Lords in the latter part of July and passed by that chamber without amendment on August 4. The knowledge that no amendments would be entertained by the Imperial Government caused a lack of interest, and the debate that ensued was aimed chiefly at the color bar to a seat in the Union Parliament. The bill then went to the House of Commons, where several amendments were offered in vain and considerable debate followed. The debate centered around three points of importance, the "European descent" clause, that is the color bar to a seat in Parliament, the native franchise, and the schedule for taking over the native protectorates. The bill was passed, however, about the middle of August without amendment,⁸ but with the unanimous regret of both Houses at the color bar. It was a matter of policy with the Imperial Parliament whether it could afford to amend such a delicately compromised bill and face the possibility of wrecking the Union and of bringing about discontent, strife, and perhaps war in South Africa, or whether it should apply the lesson taught by the American colonies and accept the request of South Africa to be allowed to solve for itself certain problems in the draft act. The Imperial Parliament took the latter course and thus initiated a new policy of trust between the home government and the colonies. The Royal assent to the act was signified in the House of Lords, September 20, 1909.

The date fixed for the King's proclamation giving effect to the Union is May 31, 1910, the anniversary of the peace of Vereeniging. Then the governor-general will be appointed, and the general elections will follow "within six months of the proclamation."

*The Preamble*⁹

The preambles to the three constitutions furnish an interesting commentary for those who speculate on the disintegration of the British Empire. Some one has pointed out a comparison between

⁸ For the amendments suggested in the House of Commons, see *Parliamentary Debates*, 1909, Vol. 9.

⁹ The abbreviations S. A., Can., and Aust. followed by numbers, which occur throughout this paper, refer to sections of the South Africa Act, the British North America Act, and the Australia Constitution Act, respectively.

the words "Whereas the provinces of Canada, Nova Scotia and New Brunswick have *expressed their desire* to be federally united into one Dominion * * * ;" "Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania * * * have *agreed to unite* in one indissoluble Federal Commonwealth * * * ;" and "We, the people of the United States * * * do *ordain and establish* this Constitution for the United States of America;" and has sought to draw from this comparison the conclusion that because the Australia act thus closely resembles the American constitution, Australia is bound to the home country by a very slender cord, and that the colonial sentiments toward the mother country and feelings of dependence on her have grown weak in reality as in expression. The corresponding words of the South Africa Act: "Whereas it is *desirable for the welfare and future progress* of South Africa that the several British colonies therein should be united under one government in a legislative union * * * " lead to a contrary opinion and show, if anything, that the pendulum is swinging in the other direction.

The striking thing to an American in the preamble of each constitution is the statement "Be it therefore enacted (and declared) by the Queen's (King's) Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled * * * ". In other words, each organic law is, as has already been noted, an act of the British Parliament, a statute on a par with any other act of Parliament.¹⁰ It is as if a State of the American Union, after drafting a constitution in convention, sent it to Congress for amendment, approval and enactment.

The main body of the South Africa Act, like that of Australia and Canada, begins with the citation name of the act (S. A. 1) and the extension of its provisions to the "heirs and successors in the sovereignty of the United Kingdom" (S. A. 3). Then follows

¹⁰ Thus other general statutes of the Imperial Parliament, such as the Colonial Boundaries Act 1905 (58 & 59 Vict., c. 34, etc.), the Colonial Courts of Admiralty Act of 1890 (53 & 54 Vict., c. 27), etc., are in force in the self-governing colonies along with their constitutions.

the method of promulgating the constitution by a proclamation of the sovereign (S. A. 4). This section in the South Africa Act as it left the convention provided for a union of "any two or more of the colonies," whereas the Australia Act provided for five, and possibly six, and the British North America Act for three. This clause therefore indicates the deep feeling of the convention in South Africa to carry out, if possible, some sort of union even though it contained but two members. Before the draft act was submitted to the British Parliament, however, each of the four colonies, Cape Colony, Orange River Colony, Natal and the Transvaal had, as we have seen, ratified the draft and consequently the final act omitted the clause just quoted. At this point in all of the acts the name of each administrative district (state, province or colony) is given, and it is to be noted that the name Orange River Colony has in the South Africa Act been changed to Orange Free State (S. A. 6). This change was recommended by Dr. Jameson, of raiding fame, and touched a tender spot in the heart of the Boer, though the name is an anomaly in a dependent country.

The Central Executive

The executive government is vested in the King and may be administered by him "in person, or by a governor-general as his representative" (S. A. 8). The provision is similar in the Australia Act save as to administration: "The executive power * * * is vested in the Queen and is exercisable by the governor-general as the Queen's representative" (Aust. 61). In the Canadian constitution the vesting is the same (Can. 9), but the exercise of the executive power by the governor-general is only incidentally mentioned as being "on behalf and in the name of the Queen" (Can. 10). The alternative in the South Africa Act tends to refute the belief of many that the colonies are becoming estranged from the home country.

The governor constitutes the main political link between the colony and the mother country. He interferes with the internal affairs of the colony only as an impartial councilor. The real duties of his office come forth when questions arise touching the interests of the mother country such as the imposition of customs duties or the public

defense. And these duties he must exercise alone, as his advisers entertain local views. He must watch and control the attempts to infringe the recognized principles which tie the colony and mother country together.¹¹ But he has no party feeling and expresses no partisan opinions.

The governor-general, as expressly provided in the South African and Australian constitutions, is appointed by the King, and since he may exercise his powers "during the King's pleasure," it is intimated that he may be removed by the King. In the fundamental law of Canada no mention is made of his appointment or removal, but it may be inferred from the fact of his representative character that the term of the agency rests with the principal, and indeed, in practice it is so considered, for in 1878 letters patent under the great seal of the United Kingdom were issued providing for his appointment from time to time by commission, and enumerating the powers and duties which shall devolve upon him.¹² Todd points out that in practice which dates from 1828 the term of office of a governor is six years and is renewable for the same period. The purpose of the practice is, he states, to insure the utmost impartiality of conduct by the governor.¹³

The South Africa and Australia Acts provide for the salary of the governor-general at 10,000 pounds, which shall not be altered during his continuance in office (S. A. 10, Aust. 3).¹⁴ The latter act adds the further limitation that he shall not "be entitled to receive any salary from the Commonwealth in respect of any other office during his administration" (Aust. 4).

The governor-general may appoint, under authority of the crown, deputies to act for him in any part of the Union (S. A. 11, Aust. 126, Can. 14).

All three acts provide for some kind of council to advise the governor-general in the administration of the government and in the exercise of his executive functions. In South Africa this body is called

¹¹ Merivale's Lectures on Colonization, p. 666.

¹² Clements, Can. Constitution, pp. 95, 96.

¹³ Todd, Parl. Govt. in Brit. Col., p. 123.

¹⁴ Compare U. S. Constitution, Art. 2, Sec. 1, subsec. 6.

the executive council, and there, as in the other self-governing colonies, it forms a part of the executive branch of the government. The members of the council are chosen by the governor-general and hold office during his pleasure, a provision common to the three colonies (S. A. 12, Aust. 62, Can. 11).

The ministry is the next executive body established in South Africa, which follows Australia closely in this respect. In both colonies it is required that the ministers be appointed by the governor-general and hold office during his pleasure (S. A. 14, Aust. 64). In practice, however, the ministry changes with every change of party control in parliament. The number of ministers in South Africa is restricted to "not exceeding ten," while in Australia the constitution provides for seven, but gives parliament power to change the number (Aust. 65). It is believed that the latter scheme would have been better for a young growing country like South Africa. The British North America Act does not mention a ministry, but this has been provided for by acts of the Canadian Parliament, vesting the appointment of ministers in the governor-general.¹⁵ It may be stated that the ministers of state correspond to our heads of departments, which with us constitute the Cabinet. In both South Africa and Australia it is required that the ministers shall be members of the executive council but not *vice versa*. Consequently, the executive council need not be made up wholly of ministers. Furthermore, both constitutions require that the ministers must be or become within three months members of either house of parliament.

Since the common law of England recognizes only one executive magistrate as exercising authority without commission, namely the crown, it follows that the powers of the governor-general must at least in theory be derived from the crown.¹⁶ These powers are in practice given by statutes or some sort of instructions from the crown or its officers. These, it must be noted, are powers for the execution of law and not essentially legislative powers, for the King, Bracton says, is not above the law but under the law. The

¹⁵ Clements, Can. Constitution, p. 97.

¹⁶ Reg. v. Bank of N. S., 11 S. C. R. 1; Musgrove v. Chun Teong Toy, 14 Vic. L. R. 349; Clements, Const., Canada, p. 79 *et seq.*

common law has invested him with these executive powers which are known as the prerogatives of the crown, and even these may be limited, if not wholly abolished, by law. Furthermore, it is stated that a governor-general is liable for his acts outside of his special authority or powers.¹⁷ The powers which it may be the crown's pleasure to grant to the governor are in South Africa and Australia subject to the constitution (S. A. 9, Aust. 2).¹⁸

Certain powers of the executive are enumerated and a distinction is drawn between the powers of the governor-general and of the governor-general in council. The power of appointment and removal of members of the executive council and the ministry, as given above, is not in practice so arbitrarily used as the words may seem to permit, for the leader of the majority in the popular house is chosen prime minister and the other ministers are selected by the prime minister and by him recommended to and appointed by the governor-general for the crown.¹⁹ It is presumed that the same method will be carried out in South Africa.

The governor-general is further granted the powers which were vested in the governors of the colonies at the date of the establishment of the constitution. This is a provision common to the three acts. But the South Africa and Canada Acts add the limitations: "as far as the same continue in existence and capable of being exercised after" the constitution goes into effect, and subject to modification by parliamentary authority. The command of the military and naval forces is vested differently in the three colonies:

¹⁷ Clements, *Can. Constitution*, p. 93.

¹⁸ A partial list of the powers of the crown in relation to the colonies follows:

Canada: Authorize governor-general to appoint deputies (Can. 14); command naval and military forces (Can. 15); summon the first senators (Can. 25); direct the addition of members to the Senate (Can. 26, 27); disallow bills (Can. 56); admit other colonies to the Dominion on address of parliament (Can. 146).

Australia: Authorize governor-general to appoint deputies (Aust. 126); grant appeals to Privy Council (Aust. 74); disallow bills (Aust. 59).

South Africa: Grant appeals to Privy Council (S. A. 106); disallow bills (S. A. 65); command naval and military forces (S. A. 17); admit new provinces on request of parliament (S. A. 150); transfer territories to the Union on request of parliament (S. A. 151); authorize governor-general to appoint deputies (S. A. 11).

¹⁹ Quick and Garran, *Const. of Aust. Com.* 709.

in South Africa "in the King or in the governor-general as his representative;" in Australia "in the governor-general as the Queen's representative;" in Canada "in the Queen." The South Africa Act like those of Australia and Canada, empowers the governor-general to recommend the necessary appropriations to the lower chamber (S. A. 62, Aust. 56, Can. 54), to declare the royal assent to bills which have passed parliament (S. A. 64, Aust. 58, Can. 55), to proclaim the crown's disallowance of such bills (S. A. 65, Can. 56, Aust. 59), and the crown's assent to reserved bills (S. A. 66, Can. 57, Aust. 60). Besides these powers there are others distributed throughout the South Africa Act which for the most part are not common to the other constitutions.²⁰

The powers of the governor-general in council are: to establish the departments of state (S. A. 14, Aust. 64), appoint and remove all officers in the public service unless the appointment is delegated to some other authority (S. A. 15, Aust. 67), appointment of the chief magistrates (administrators and lieutenant-governors) in the provinces (S. A. 68, Can. 58), and of the judges of the Supreme Court and the removal of same upon the request of parliament (S. A. 100, 101, Aust. 72). There are numerous other powers scattered through the South Africa Act which are brought together below, together with the remaining powers of the governor-general in council in Australia and Canada.²¹

²⁰ The remaining powers of the governor-general are substantially as follows;

South Africa: Appoint the times for holding sessions of parliament, and dissolve and prorogue the same (S. A. 20); fill vacancies in the Senate (S. A. 20); convene joint sittings of parliament (S. A. 58, 63); take oaths of members of parliament (S. A. 51); sign the laws (S. A. 67); sign ordinances of Provincial Councils (S. A. 91); appoint deputies (S. A. 11).

Canada: Choose senators (Can. 24, 26, 27); appoint and remove speaker of Senate (Can. 34); fill vacancies in Senate (Can. 32); cause writs to be issued for election of House of Commons (Can. 42); appoint provincial judges (Can. 96); remove provincial judges on request of parliament (Can. 99); appoint public officers deemed necessary by governor-general in council (Can. 131); appoint deputies (Can. 14); take oaths of members of parliament (Can. 128).

Australia: Notify vacancies in Senate to governor of state (Aust. 21); dissolve parliament (Aust. 57); convene joint sittings of parliament (Aust. 57); appoint deputies (Aust. 126).

²¹ The remaining powers of the governor-general in council are in the main as follows:

The Seat of Government

The seat of the executive branch of the government in South Africa is to be located in Pretoria in the Transvaal (S. A. 18), while Cape Town is to be the seat of the legislature (S. A. 23), and the Appellate Division of the Supreme Court of South Africa is to sit at Bloemfontein in Natal (S. A. 109).

The question of the location of the capital for South Africa occupied the constitutional conventions even more than did the native problem. It was the one question which was discussed to the very last. The Transvaal would hear to nothing but Pretoria's being the capital, while Cape Colony was equally insistent on Cape Town. Durban and Bloemfontein were also mentioned as possibilities. Pretoria it was argued is a somewhat central inland town, though prices are high and mining interests are the controlling feature. Moreover, Pretorians have little to gain by union inasmuch as they already

South Africa: Nominate the senators (S. A. 24); appoint the districting commission (S. A. 38-41); proclaim the boundaries of electoral divisions (S. A. 42); appoint election day of members of House of Assembly (S. A. 37); approve remuneration of executive committeemen (S. A. 78); disapprove rules of proceedings of provincial councils (S. A. 75); determine salaries of members of provincial councils (S. A. 76); assent, etc., to ordinances of provincial councils (S. A. 90); appoint, remove, regulate and fix salary of Auditor of Accounts (S. A. 92); postpone filling vacancies in Supreme Court (S. A. 102); fill vacancies in Supreme Court due to absence, etc. (S. A. 97); approve rules of courts (S. A. 107, 108); undertake the government of native territories (S. A. 151); receive all revenues (S. A. 117); receive all public property (S. A. 122); receive all mines and minerals (S. A. 123); receive all posts, harbors and railways (S. A. 125); appoint financial commission (S. A. 118); reduce compensation to former capitals on approval of parliament (S. A. 133); appoint and remove Controller and Auditor-General (S. A. 132); cause Railway and Harbor Board to furnish services (S. A. 131); supervise, appoint and remove Railway and Harbor Board (S. A. 126); appoint and assign duties to attorneys-general for the provinces (S. A. 139); appoint Public Service Commission (S. A. 141, 142); control and administer native affairs (S. A. 147); frame regulations for elections (S. A. 134).

Canada: Appoint deputy lieutenant-governor (Can. 87); regulate, review and audit first charge on revenue fund (Can. 103); regulate payments of money to provinces (Can. 120); deliver public documents and records to Ontario or Québec (Can. 143).

Australia: Cause writs to issue for elections to House of Representatives (Aust. 32); appoint members of Interstate Commission (Aust. 103).

have prosperity and large assets which latter upon joining the Union would be thrown into the common treasury to cancel the debts of other colonies. Cape Town is on the other hand not only the oldest city in South Africa, but also the seat of education and culture. The Cape was willing to let the decision go to the Union parliament but Pretoria refused. The matter was finally adjusted by compromise in the last days of the first convention. The convention, however, was supported by precedent, for the Calcutta-Simla capital in India and the London-Dublin capital in Great Britain are successful examples of divided capitals. If the arrangement lasts for ten years, it will be considered satisfactory, as it took Australia and Canada about that period to come to a final decision on the same point. Moreover, the plan is not without its advantages, for it will cause officials to travel and become acquainted with the extreme conditions and needs of the country.²²

In the Australia act the location of the capital is left to the Union parliament with the provision that it

shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State of New South Wales, and be distant not less than one hundred miles from Sydney.

Such territory shall contain an area of not less than one hundred square miles. * * *

The Parliament shall sit at Melbourne until it meet at the seat of Government (Aust. 125).

This quotation likewise shows marks of divided opinions, stubborn pretensions, and careful compromise. The convention at first left the question unconditionally to the parliament, but later discussion and debate together with the refusal of New South Wales to pass the bill with the statutory majority led to the insertion of the above conditions as a sop to New South Wales.²³

The British North America Act provides for the seat of government to be at Ottawa "until the Queen otherwise directs" (Can. 16), but does not separate the various branches of government as is done in South Africa.

²² Files of "South Africa," Oct., 1908-Oct., 1909.

²³ Quick and Garran, Const. of Aust. Com., 978, 979.

The Provincial Executive

The original provinces designated in each constitution correspond to the colonies which in the beginning formed the Union. For these the South Africa Act provides a well defined provincial government, but the Australian constitution does not clearly outline the "States" in either their constitution or their powers. On the other hand, the British North America Act goes into considerable detail on these subjects, and, owing to the fact that each province is more or less differently organized, sets forth apparently a very complex system of provincial government.

In South Africa the executive powers of the provinces are vested in administrators and their executive committees, likewise in Canada they are vested in lieutenant-governors and their executive councils. In Australia the matter is dismissed by one sweeping paragraph in the act to the effect that the constitution of each State shall continue as at the establishment of the Commonwealth (Aust. 106), but elsewhere in the act reference is made incidentally to a chief executive officer, or governor, of each State (Aust. 110, etc.), the mode of whose appointment is, it seems, determined by the State parliament. In South Africa the administrator is appointed by the governor-general in council, as is the case of the lieutenant-governor in Canada. In the former country he is to be chosen if practicable from his province, for a term of five years, to be removed by the governor-general in council for cause shown, and to receive a salary which is to be fixed by the Union parliament. A deputy may be similarly appointed in his absence or illness (S. A. 68, 69). In Canada the lieutenant-governor holds office during the pleasure of the governor-general, receives a salary to be fixed by parliament and subscribes to an oath of allegiance (Can. 58-61). Clements points out that the power of removal has twice been exercised, in 1879 and 1899, and states that in the former case the lieutenant-governor resigned because he had been censured by a vote of the federal parliament which, he alleged, impaired his usefulness; that the Imperial authorities instructed the governor-general thereafter to act under this section (Can. 59), on the advice of his ministers; and that thus parliament had gained control over the provincial execu-

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tive though it can not enact a single law to govern his conduct of provincial affairs.²⁴ An administrator to execute his office in his absence may be appointed when necessary (Can. 67), but only by the governor-general in council, and not by the lieutenant-governor.

The executive committees in the South African provinces consist of four members with the administrator as chairman, chosen by the provincial legislative body from among its number, hold office until their successors are appointed in the same manner, and receive a salary fixed by the legislature (S. A. 78). The administrator and the other members of the committee may sit and speak in the provincial council, but may not vote (S. A. 79).

In Canada the executive council for the provinces of Ontario and Quebec is composed of such persons as the lieutenant-governor thinks fit, in the first instance of the attorney-general, the secretary and registrar of the province, the treasurer, the commissioner of crown lands, and the commissioner of agriculture and public works, besides in Quebec, the speaker of the local legislature and the solicitor-general (Can. 63).²⁵

The powers, authorities and functions of the executive are the same as were exercised prior to the act, as far as the same are capable of being exercised after the union (S. A. 81). A similar provision exists in the British North America Act regarding Ontario and Quebec (Can. 65). In Nova Scotia and New Brunswick, however, the "executive authority," meaning probably the organization as well as the powers of the executive, continues as it existed at the union (Can. 64), but Clements appears to believe that this section does not include powers.²⁶ At this point the South Africa Act goes further than even the detailed British North America Act and lays down the mode of procedure in the executive council (S. A. 82).

In South Africa, therefore, the executive powers of the provinces are divided as in Canada between an executive called the administrator and an advisory council designated the executive

²⁴ Clements, *Can. Constitution*, p. 141.

²⁵ For the composition of the executive council in the other Canadian provinces, see Clements, *Can. Constitution*, p. 85.

²⁶ Clements, *Can. Constitution*, p. 143; for organization, see p. 85.

committee, of which the administrator is a member. The executive committee has the general "administration of provincial affairs," including those powers previously exercised by the governor and the governor in council of the colony (S. A. 81). It may also, subject to parliament, appoint and discipline whatever additional provincial officers may be necessary (S. A. 83). In the absence of a quorum, however, the duties of the committee may be performed by the administrator (S. A. 80) and in whose name all of the executive acts in any event are done (S. A. 68). He may, when required to do so, act for the governor-general in the exercise of any powers not reserved or delegated to the provincial council (S. A. 84). The South African constitution further provides for another provincial executive officer, named Auditor of Accounts. He is to be appointed and removed by the governor-general in council, and authorized to examine and audit the accounts of the province and to countersign warrants for the issue of money (S. A. 92). Further powers of the chief executives of the provinces are brought together below.²⁷

Both the South Africa and the British North America Act designate the seats of provincial government (S. A. 94, Can. 68). In South Africa these are the former capitals of the colonies and provision is made for compensating them for the "diminution of prosperity or decreased ratable value" by reason of their ceasing to be such capitals (S. A. 133).

²⁷ Most of the remaining powers of the chief executive of a province or state are as follows:

South Africa: Fix place of elections for members of provincial councils (S. A. 71); fix times for sessions of provincial councils and prorogue same (S. A. 74); recommend appropriations (S. A. 89); promulgate ordinances of provincial councils (S. A. 91); cast vote in executive committees (S. A. 82).

Canada: Appoint executive councils (Can. 63); appoint legislative councils (Can. 72); fill vacancies in legislative councils (Can. 75); appoint speaker of legislative councils (Can. 77); dissolve legislative assembly (Can. 85); cause writs to be issued for election of members of legislative assembly (Can. 89); take oaths of members of legislative council and legislative assembly (Can. 128); summon the legislative assembly (Can. 82); constitute townships in parts of Quebec (Can. 144); appoint and prescribe duties of certain officers (Can. 134); see also Section 90.

Australia: Cause writs to be issued for elections of senators (Aust. 12).

The Union Legislature

The "legislative power" in South Africa is vested in the King, the Senate, and a House of Assembly (S. A. 19). This is exactly the wording of the Australia Act, except that the latter names the lower chamber a House of Representatives. The British North America Act does not use the words "legislative power," but states that "there shall be one parliament * * * consisting of the Queen * * * the Senate, and the House of Commons." (Can. 17.) The meaning, however, is substantially the same.

The South Africa Act, as well as the Australia and the British North America Acts, thus provides for a bicameral or two-house legislature such as we enjoy in the United States. History and theory agree that a bicameral system is safer than a unicameral legislature and less conservative than one of more than two chambers.

The King being a member of the law-making body the query naturally arises to what extent may he alone exercise his legislative power at home or over a colony. In theory all legislative power is vested in the King. So in England for over 300 years every act of Parliament has been entitled "Be it enacted by the King's Most Excellent Majesty by and with the advice and consent" of parliament.²⁸ But it is well known that in practice the power is exercised chiefly in the disallowance of bills, so that the crown is not the principal, much less the sole, legislator. This fact is now recognized officially by the statutes of Australia, which begin: "Be it enacted by the King's Most Excellent Majesty, the Senate, and the House of Representatives, of the Commonwealth of Australia." Probably the South Africa enactments will follow a similar formula. All of the powers of the legislature are indicated in the constitution. Whenever the legislature exceeds its limited jurisdiction it becomes the duty of the crown to veto the measure, for the delay of a suit in court and possible appeals might be detrimental to public interests.²⁹

Parliament is to be prorogued and dissolved by the governor, who

²⁸ Quick and Garran, *Const. of Aust. Com.*, p. 385.

²⁹ Todd, *Parl. Govt. in Brit. Col.*, 2d Ed., pp. 155, 156.

also appoints the time for the sessions (S. A. 20). A similar provision is found in the Australia Act, but it is omitted in the British North America Act. In South Africa, though the governor may dissolve both houses simultaneously or the Assembly alone, he is not given the power to dissolve the Senate alone. In Australia he may dissolve the House of Representatives but not the Senate nor both houses at once, except where they have twice disagreed on a bill (Aust. 57). The dissolution of parliament, like the assembling thereof, is a prerogative of the crown, which is thus delegated to the governor-general. In Canada proroguing and dissolving parliament exist, as at common law,³⁰ in the crown who has by letters patent delegated the authority to the governor-general. On grounds of policy, as we shall see later, the South Africa constitution prohibits the dissolution of the Senate for the first ten years of the Union (S. A. 20). Since there is a difference between proroguing and summoning parliament, there must be some grant of the latter power to the governor. No such power, save summoning the Commons in Canada (Can. 38), is found in any of the constitutions, but the power has been given in letters patent to the governors of both Canada and Australia,³¹ and probably will be likewise granted in South Africa. The Australia Act adds the provision that parliament shall be summoned within thirty days after the return of the writs of any general election.

Parliament is finally required to hold a session "once at least in every year, so that a period of twelve months shall not intervene" between the sessions (S. A. 22, Aust. 6, Can. 20). This provision has for its object the preservation of the English rule of annual grants for the public service. In England by 6 & 7 William & Mary c. 2, parliament need not be held oftener than once in three years, but the passing of the "Mutiny Act" for one year only requires an annual session.³²

³⁰ Clements, *Can. Constitution*, p. 98.

³¹ Quick and Garran, *Const. of Aust. Com.*, p. 392; Clements, *Can. Constitution*, p. 98.

³² Clements, *Can. Constitution*, p. 110.

The Senate

The term Senate, following the American precedent, is used in all three acts to designate the upper house of the Union legislature. A somewhat novel arrangement is presented in the South Africa Act for the constitution of the Senate. In the first place it is immutable for ten years after the establishment of the Union (S. A. 24). The evident purpose of this provision is to preserve a consistent and uniform check upon legislation during the period of amalgamation of the races and the political views existing in the various colonies. It will no doubt greatly lessen party strife in a country where parties might at this time separate along racial lines.

In the next place, eight senators are to be nominated by the governor-general in council, while each province is to be represented by eight senators chosen by the joint houses of each province (S. A. 24). Four of the nominated senators shall be selected on the ground mainly of their acquaintance "with the reasonable wants and wishes of the colored races of South Africa" (S. A. 24). This is one of the few provisions in the act concerning the much discussed native question which will be considered below.

After the lapse of the first ten years of the Union, parliament is given the power to provide for the constitution of the Senate. Until parliament makes such provision, however, the above plan is to be followed, except that the eight senators from each province are to be elected by the Provincial Council and the provincial members of the House of Assembly sitting jointly and acting under regulations prescribed by the governor-general in council. A vacancy is to be filled in a similar manner (S. A. 25). When, however, such an election is contested, the election shall be according to the principle of proportional representation each voter having one transferable vote (S. A. 134).

The scheme above outlined is different in many respects from the organization of the Australian Senate. In that country senators, six to each State, are directly chosen by the people for a term of six years (Aust. 7). A vacancy is filled by appointment until the next succeeding election. (Aust. 15.) The popular election of senators was adopted because of the volume of opposition against the

American method of election by legislatures and because part of the State legislatures in Australia were appointed by the Crown.³³ But the continuity of the Senate, such as is had in the United States, is broken by the new election of senators after a dissolution of the Senate (Aust. 12). Parliament may increase or decrease the number of senators but the representation must be equal, and not less than six senators for each original State. (Aust. 7.) Equal representation is further safe-guarded by section 128 which provides that no change in the constitution affecting a State shall be made unless approved by the majority of electors in that State. The Senate is divided into halves, the term of one-half expiring in three years and the other in six years, and so on until a dissolution when it is again divided. (Aust. 13.) There are also various general provisions concerning senatorial elections which must be uniform in all the States. (Aust. 8, 9, 10, 12.)

The organization of the Canadian Senate is still different. By the act of 1867 the country was divided into three sections as regards representation in the Senate; Ontario, Quebec, and the Maritime Provinces, including Nova Scotia and New Brunswick (Can. 22). Each division was to have twenty-four senators. If Newfoundland entered the Dominion, which has never happened, she was to have four senators, and if Prince Edward Island joined, she was also to be given four senators by a process of adding her to the section of Maritime Provinces and taking away two senators each from the number accredited to Nova Scotia and New Brunswick (Can. 147). Under the act of 1867 the first senators were summoned to the senate by the Queen, their names being inserted in the royal proclamations of union (Can. 25). Additions to these were afterward made by three or six, equally distributed among the three divisions, and summoned by the governor-general upon royal direction (Can. 24-26). This provision was introduced upon the recommendation of the English government for the purpose of

restoring harmony between the legislative council and the popular assembly if it shall ever unfortunately happen that a decided difference of opinion shall arise between them.³⁴

³³ Quick and Garran, *Const. of Aust. Com.*, pp. 418, 519.

³⁴ Clements, *Can. Constitution*, p. 116.

After the number of senators had thus been increased by three or six, the normal number of seventy-two was resumed by lack of further appointment, except upon royal direction (Can. 27). The act of 1871 allowed parliament to provide for representation in the senate of provinces subsequently admitted. Consequently, Manitoba has four senators, British Columbia three, Alberta and Saskatchewan four each, making a total of eighty-seven senators,³⁵ notwithstanding the act of 1867 states that "the number of senators shall not at any time exceed seventy-eight" (Can. 28). But the latter number is held to apply only to the original provinces. With the entry of the new provinces, the principle of equal representation was broken down, except as to the three original divisions of Canada. No change can now be made without an Imperial act.³⁶ Thus the theory of equal State rights constitutionally and politically, has been dropped from the Canadian scheme and the plan of true federation of equal States has received a vital blow. The term of a senator is for life (Can. 29), a guarantee probably of independence in the exercise of his legislative duties.³⁷ Vacancies are filled by summons of the governor-general (Can. 32).

The qualifications of senators vary in the three colonies: South Africa and Canada set the age at thirty years, while Australia admits them at twenty-one; South Africa and Australia require eligibility to vote for a member of the lower house; South Africa provides for five years residence, Australia three years, and Canada merely that the senator reside in the province from which he is appointed. "A British subject of European descent" alone is eligible in South Africa the natives being thus excluded, while in Australia and Canada he must be either a native or naturalized subject; South Africa requires a property qualification of five hundred pounds in immovables and Canada \$4,000 (S. A. 26, Can. 23, Aust. 34). In Canada, as in the United States, the decision of questions respecting qualifications of senators, is given to the Senate (Can.

³⁵ Dodd, *Modern Constitutions*, p. 180.

³⁶ Clements, *Can. Constitution*, pp. 112, 113.

³⁷ Clements, *Can. Constitution*, p. 112.

33, U. S. Art. 1, sec. 5). Moreover, none of the colonial Senates exercises judicial functions such as the American Sénate does and in a larger degree the House of Lords; neither does it enjoy executive life as does the United States Senate in relation to treaties and appointments to office.³⁸

The Senate being thus established, the running of the body in the three colonies is provided for in similar terms. Thus in South Africa and Australia the Senate chooses a president (S. A. 27, Aust. 17) whose removal, resignation, or successor is provided for in the constitution. But in Canada the governor appoints and removes the "speaker" (Can. 34). Also a senator in any of the colonies may resign his seat (S. A. 29, Aust. 19, Can. 30) in writing addressed to the governor (or president in Australia). Canada, however, is the only colony providing in detail for vacancies for other reasons than resignation, as change of allegiance, bankruptcy, treason, felony, loss of the property, residence, or other qualification (Can. 31). But in South Africa as well as Canada and Australia non-attendance for one whole session, two consecutive sessions, or two consecutive months, respectively, without permission, forfeits the seat (Aust. 20). Each constitution provides for a quorum: twelve being the necessary number in South Africa, fifteen in Canada and one-third of the senators in Australia (S. A. 30, Can. 35, Aust. 22), and in the latter country the failure of any State to be represented does not interrupt the despatch of business (Aust. 11). This provision was thought to be an inducement to hold early elections to fill vacancies in the Senate.³⁹ While all of the constitutions provide that questions shall be determined by a majority of votes, in South Africa as in the United States the president of the Senate has no vote save in case of a tie; whereas in the other colonies, the presiding officer always has a vote and an equality of votes is a negative decision (S. A. 31, Aust. 23, Can. 36, U. S. Art. 1, sec. 3); for, it is said, to give a presiding officer who is also a senator a casting vote would grant unequal representation.

³⁸ Clements, *Can. Constitution*, p. 112.

³⁹ Quick and Garran, *Const. of Aust. Com.*, p. 429.

The Lower Chamber

The discussion of the lower house of parliament can not, owing to lack of space, be carried into as great detail as the description of the Senate has been. Being chosen by the people, the House is of course the popular chamber, while the Senate, as we have seen, is appointive save in Australia. The members of the lower house, called House of Assembly in South Africa, House of Commons in Canada, and House of Representatives in Australia, are directly chosen by the people (S. A. 32, Aust. 24). It is not expressly so stated in the Canada Act, but the word "elected" is constantly used in that connection. The initial number and apportionment of members is likewise indicated, 121 for South Africa, 181 for Canada, 62 for Australia (S. A. 33, Can. 37, Aust. 26), and each act provides for readjusting the representation at a later date if necessary. In South Africa the number may not be diminished until the total number has reached 150 members or until ten years have elapsed (S. A. 33). This is evidently for the purpose of maintaining the excessive representation given to the weaker provinces and giving them ample opportunity to develop and to forget the ignominy of unequal representation. In Australia and Canada parliament is given the power to make laws subject to the constitution for increasing the representation (Aust. 27, Can. 52). In all of the colonies the readjustment of representation is ultimately on the basis of population. In South Africa a "quota of the Union" is obtained by dividing the total European male population⁴⁰ as shown by the census of 1904 by the total initial number of representatives. A census of European male adults is required every five years and for every increase by the amount of a quota an additional member is given to a province, save in those provinces already enjoying excessive representation. To any of these no additional member is given until the population ex-

⁴⁰ This provision eliminates the native voters in the Cape from the calculation of the quota and thus reduces the number of representatives from that province. Though this in a way produces inequality of representation, it is believed in South Africa that equal representation will ultimately be achieved. In order to placate the Cape on this point proportional representation for the House of Assembly was omitted in favor of one member constituencies.

ceeds the quota multiplied by its present number of representatives. Thus the undue representation is brought back to the normal (S. A. 34). But the number of representatives can not so be increased above 150, without the consent of parliament.

In Australia, after the initial election the number of representatives is to be as "nearly as practicable twice the number of the senators" and is to be in proportion to the population. The quota is obtained "whenever necessary" by dividing the total population as shown by the latest statistics by twice the number of senators, and the number of members for each State is obtained by dividing the population of the State by the quota. But not less than five members may be returned by any original State (Aust. 24), and disqualified voters are not to be counted in the population for obtaining representation (Aust. 25). It is said that this clause is based on the fourteenth amendment to the constitution of the United States and also that the power to authorize the preparation of the statistics and to declare when a reapportionment is necessary would appear to rest with the parliament.⁴¹

In Canada the readjustment is made after every decennial census. Quebec is to have the fixed number of sixty-five members and the quota is obtained by dividing her population by sixty-five. The number of members to be assigned to each province is arrived at by dividing its population by the quota. But no reduction is to take place in the representation of any province unless the ratio of its population to the total population of Canada has been reduced one-twentieth part or more (Can. 51). Subject to these provisions the number of members is to be increased only by parliament⁴² (Can. 52).

⁴¹ Quick and Garran, *Const. of Aust. Com.*, pp. 454, 456.

⁴² Compare the reapportionment Act of Oct. 24, 1903. The American plan is to apportion not more than one representative to every 30,000 inhabitants, but each State shall have at least one representative (U. S. Const., Art. 1, sec. 2). The reapportionment is generally made by act of Congress following the decennial census. The act apportions the number of members to each State and provides that the State legislature divide the State into districts having about equal populations and returning one member each. See Act of Congress Jan. 16, 1901, 31 *Stats. Large* 733.

The electoral districts in South Africa and Canada return one member each (S. A. 39, Can. 40) while in Australia, each State is an electorate unless it is otherwise regulated by parliament (Aust. 29). In South Africa the redistricting is automatic. After the first districting the governor-general in council shall choose three judges of the Supreme Court of South Africa who shall divide each province into electoral districts containing a quota of electors. In arriving at the result the judges are to consider community or diversity of interests, means of communication, physical features, diversity of population, etc., and may depart from the calculated population of such a district fifteen per centum either way (S. A. 40). The redistricting is to be done after each quinquennial census. This method is aimed at preventing "gerrymandering" which has received so much criticism in the United States, where, as we have seen, the redistricting is done by the State legislatures.

In Australia this matter is left to the parliament for regulation (Aust. 29). Meanwhile, the States as in America determine it, and such was the case in Canada (Can. 51).⁴³

All of the constitutions provide more or less in detail for elections of members and qualifications of voters. With remarkable similarity all leave the qualifications of voters as they were in the colonies unless otherwise provided by parliament (S. A. 35, 36, Aust. 30, Can. 41). Consequently until made so by parliament the qualifications of voters need not be uniform throughout the Union. Diversity likewise exists in America where the franchise is purely a State question. In South Africa, however, there are the limitations that "no such law [of parliament] shall disqualify any person in the province of the Cape of Good Hope who * * * at the establishment of the Union is, or may become capable of being registered as a voter * * * by reason of his race or colour only" unless the bill shall pass both houses in joint sitting by two-thirds of the total number of members; and that "no person who at the passing of any such law is registered as a voter in any province shall be removed from the register by reason only of * * * race or colour" (S. A.

⁴³ Compare the Reapportionment Act of Oct. 24, 1903.

35).⁴⁴ These clauses are the result of a compromise on the negro franchise question which was one of the most hotly discussed problems before the convention. Cape Town was the only colony that had granted the ballot to the natives, and she not only refused to surrender their franchise, but sought thus to safeguard it in the constitution against encroachments by the other colonies.⁴⁵ There is no express provision for woman suffrage, though a petition to that effect was laid before the convention. The word "persons," however, in section 35 might reasonably be construed to include both male and female voters.

The election of members is in each act controlled by the laws of the provinces as they were at the time of the union, unless, in Australia and Canada, otherwise changed by parliament (S. A. 37, Aust. 30, Can. 41); but in South Africa there is a general provision that the elections shall take place on the same day, to be selected by the governor-general in council, throughout the Union (S. A. 37).⁴⁶

The qualifications of representatives to the lower house in South Africa are those of an elector who has resided within the province five years and is a "British subject of European descent" (S. A. 44). Thus the natives are barred from sitting in the House of Assembly. In Australia the qualifications are the same as those for senators already given (Aust. 34), while in Canada they are such as the laws of the province provide for provincial assemblymen (Can. 41).

With the lower house thus established and organized, its maintenance and procedure are in a measure provided for in the constitutions. Thus it is to continue unless sooner dissolved, for five years in South Africa and Canada (S. A. 45, Can. 50), and three years in Australia (Aust. 28). In South Africa and Australia a member may resign in writing addressed to the presiding officer or the governor-general (S. A. 48, Aust. 37). The speaker is elected by the House and a vacancy or absence is filled in the same manner. The Canadian constitution is similar, but it defines absence as non-

⁴⁴ For debate on whether these clauses cover natives who acquire the ballot in the future, *see* Parliamentary Debates, 1909, Vol. 9, column 1639.

⁴⁵ Compare U. S. Const. Amendments 14 and 15.

⁴⁶ Compare U. S. Const., Art. 1, Sec. 4.

attendance for forty-eight consecutive hours. In the former two countries he may be removed by a vote of the House (S. A. 46, Aust. 35).

The quorum of members necessary for the transaction of business is provided for in each constitution: thirty in South Africa, twenty in Canada, and one-third of the members in Australia (S. A. 49, Can. 48, Aust. 39), while in the United States, Switzerland, and Germany, a majority is sufficient.

All three constitutions provide that a majority of votes shall determine all questions and that the speaker shall have a vote only in case of a tie (S. A. 50, Can. 49, Aust. 40).

Both Houses

The houses of parliament in Canada are so different in their make-up that the constitution contains very few provisions common to both. On the other hand, the provisions in the South Africa and Australia Acts under this head are strikingly similar. Thus members are required to take an oath of allegiance to the crown before taking their seats (S. A. 51, Aust. 42, Can. 128), and a member of either house shall not sit as a member of the other house (S. A. 52, Aust. 43). In Canada the last restriction is limited to senators who can not sit or vote in the House (Can. 39). South Africa, on the other hand, has crystalized into its constitution the English custom that ministers of state may sit and speak in either house but vote only in the one of which they are members. Certain disqualifications are imposed on members, such as: holding another office of profit under the crown (but this does not apply to ministers, pensioners, or in general members of the military or naval forces); insolvency; and conviction and imprisonment for a crime. To the last Australia adds the words, "and is under sentence or subject to be sentenced" therefor, while South Africa uses the words, "shall have been sentenced," but adds, "unless he shall have received * * * a pardon or unless such imprisonment shall have expired at least five years before the date of his election." The South African constitution adds the further disability of unsound mind, while Australia forbids allegiance or adherence to a foreign power or pecuniary

interest in any agreement with the public service, save as a member of a corporation of more than twenty-five members (S. A. 53, Aust. 44).⁴⁷

The penalty for incurring any of these disabilities or for failing to attend parliament (two consecutive months in any session in Australia, or for a whole session in South Africa) without leave, is the loss of the member's seat. In Canada the penalty for non-attendance is limited to senators (Can. 31). In South Africa the same penalty follows the failure to possess the other qualifications for membership, and in Australia the taking of fees for services rendered to the Commonwealth or in the parliament to any person or State (S. A. 54, Aust. 45, 38, 20). Moreover, in both countries one who is disqualified is liable to pay one hundred pounds for each day that he occupies a seat as a member of either house. South Africa adds the words "knowing that he is so disqualified" and requires the fine to be paid into the treasury, while Australia grants the fine to any one who sues for it (S. A. 55, Aust. 46).

Both South Africa and Australia grant a salary of four hundred pounds to a member of either house,⁴⁷ the former deducting three pounds for every day of absence and granting no allowance to a minister receiving a salary or to the presiding officer (S. A. 56, Aust. 48). One can fancy a dignified senator or an important assemblyman rushing to his seat before roll call, proffering an excuse for absence or possibly by agreement answering to the name of a belated colleague. The powers, privileges, and immunities of both houses and their members shall be declared by parliament (S. A. 57, Aust. 49, Can. 18⁴⁸), and until so declared shall be in South Africa those of the House of Assembly of the Cape of Good Hope, and in Australia those of the English House of Commons, while in Canada parliament may grant no greater privileges and immunities than those enjoyed by the English House of Commons.⁴⁹ Then follow provisions for

⁴⁷ Compare U. S. Const., Art. 1, Sec. 6, Subsec. 1, where salaries are left to be fixed by law.

⁴⁸ As amended by "The Parliament of Canada Act 1875."

⁴⁹ For a list and discussion of the powers, privileges and immunities of the House of Commons, see Quick and Garran, *Const. of Aust. Com.*, p. 501 *et seq.*

the conduct of business, and in the South Africa Act for the procedure of joint sittings.⁵⁰

The Provincial Legislature

In the South African and the Canadian constitutions the legislative bodies are outlined in considerable detail, while in the Australia Act, owing to the continuance of the State constitutions, little mention is made of the matter (Aust. 106). In South Africa the local legislature is designated the provincial council. A provincial council is granted to each province and consists of not less than twenty-five members elected one from each parliamentary electoral district (S. A. 70). The qualifications of members are those of the electors, which in turn are those of voters for members of the House of Assembly. Thus natives in the Cape province may sit in the council. Details for adjustment of electoral divisions when necessary and for elections, are also given (S. A. 70, 71). The disabilities of members of parliament, such as conviction of crime, insolvency, etc., the conditions on which their seats become vacant and the penalty for sitting when disqualified are applied *mutatis mutandis* to members of the council; and a member may not at the same time be a member of parliament (S. A. 72). The council shall continue for three years without being sooner dissolved (S. A. 73) and a session must be held once each year (S. A. 74). Then follow provisions concerning the conduct of business, the salary of members, and freedom of speech and vote in the council (S. A. 75, 76, 77).

The British North America Act provides for two sorts of provincial legislatures owing to the fact that their organization prior to the act was largely retained in force. Ontario has a "legislative assembly," consisting of the lieutenant-governor and one house originally of eighty-two members, one from each electoral district (Can. 69, 70). But the number of members has been several times changed in different provincial legislatures, since 1867, under

⁵⁰ For other powers which are common to both houses, compare S. A. 26 and 44, 31 and 50, 28 and 47, 27 and 46; Aust. 16, 17 and 35, 18 and 36, 20 and 38, 19 and 37, 22 and 39.

authority of section 92.⁵¹ It is now well settled that the crown is a party to provincial legislation, the lieutenant-governor representing the British sovereign as a constituent branch of the assembly.⁵² The constitution of the legislature in Nova Scotia and New Brunswick continue, subject to change under the act, as they existed at the union (Can. 88), and like Quebec have a legislature composed of the lieutenant-governor and two houses styled the "legislative council" and the "legislative assembly" (Can. 71). The legislative council of Quebec had originally twenty-four members appointed by the lieutenant-governor to represent each of twenty-four electoral districts and to hold office for life unless the legislature provides otherwise (Can. 72). The qualifications of these councillors and the conditions of vacating their seats are the same as for senators for Quebec (Can. 73, 74). Then follow detailed provisions, comparable to similar sections relating to the parliament of Canada, for filling vacancies, deciding questions respecting qualifications and vacancies, appointing and removing the speaker, constituting a quorum, and determining questions by a majority vote (Can. 75-79). The legislative assembly of Quebec is composed of sixty-five members elected from each of sixty-five electoral divisions which are subject to alteration under certain conditions (Can. 80).

In respect to the legislative assemblies of both Quebec and Ontario the Canadian constitution provides that they be called together by the lieutenant-governor; that a session be held once each year;⁵³ that an office of profit under the lieutenant-governor render the incumbent ineligible to membership, but he may be a member of the executive council or hold certain other named offices if he be elected while holding such office. There are further provisions that the qualifications of members and of electors, and the method of election, be governed by the laws in force at the union; that the legislatures continue for four years unless sooner dissolved; and that the corresponding provisions for the House of Commons of Canada govern

⁵¹ Clements, *Can. Constitution*, p. 148.

⁵² Clements, *Can. Constitution*, p. 147, citing *Liquidator's Case*, 61 L. J. P. C. 75.

⁵³ Note the absence of a similar provision for Nova Scotia and New Brunswick.

the speakership, quorum, and the mode of voting (Can. 82-87). All of these provisions save the first two (Can. 82, 86) have since been changed or acted upon by the local legislatures under the blanket power granted in section 92.⁵⁴

The legislatures of all of the provinces are subject to the same limitations as the Dominion parliament in regard to appropriation and tax bills, recommendation of money votes, and the assent, disallowance, and reservation of bills (Can. 90).

The Powers of the Union Legislature

The Union and provincial legislatures being thus organized and established, the distribution of the powers of legislation between the Union and the provinces will be taken up separately.

All of the constitutions make a general grant to parliament of power "to make laws for the peace, order and good government" of the colony (S. A. 59, Aust. 51, Can. 91). The British North America Act explains that this general power extends to

all matters not coming within the classes of subjects by this act assigned exclusively to the legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that * * * the exclusive legislative authority of the parliament of Canada extends to all matters coming within the classes of subjects next hereafter enumerated, * * * (Can. 91).

Then follows an enumeration of the powers delegated to the Union legislature, while the next section sets forth the matters in respect to which the provincial legislatures have exclusive power to make laws (Can. 92).

The Australia Act, on the other hand, does not thus explain the general grant, but merely appends thereto a list of powers without in any manner specifying whether they are exclusive powers (Aust. 51). But the succeeding section is in these words:

The parliament shall * * * have exclusive power to make laws for the peace, order and good government of the Commonwealth with respect to:

⁵⁴ Clements, Can. Constitution, pp. 150-153.

Then follows another list of powers (Aust. 52). No detailed enumeration of powers of the States is given, nor is there in terms any general division of powers except in these words:

Every power of the parliament of a colony * * * shall unless it is by this constitution exclusively vested in the parliament of the Commonwealth or withdrawn from the parliament of the State, continue as at the establishment of the Commonwealth (Aust. 107).⁵⁵

The South Africa Act follows the general grant as to "peace, order and good government" by no enumeration of powers whatever and in the succeeding sections goes on to discuss money bills, royal assent, etc. Even equality of taxation, which public opinion hopes will be ultimately attained, is not required by the constitution. The first section under provincial powers, however, reads

Subject to * * * the assent of the governor-general in council as hereinafter provided, the provincial council may make ordinances in relation to matters coming within the following classes of subjects * * * . (S. A. 85.)

This is followed by a catalogue of subjects which may be regarded as outlining the exclusive jurisdiction of the provincial legislatures. Further discussion of the division of powers will be continued after some of the powers have been roughly compared.

The subjects concerning which the Canadian parliament has exclusive legislative authority are typical and include: public debts and property, trade and commerce, taxation, loans, postal service, census, defense, salaries of federal officers, navigation and shipping, quarantine, fisheries, currency and coinage, banking and paper money, weights and measures, legal tender and interest, bankruptcy, patents, copyrights, Indians, naturalization and aliens, marriage and divorce, criminal law and procedure, etc. To these subjects should be added those expressly excepted from the topics exclusively within the sphere of provincial legislation, namely, the office of lieutenant-governor, transportation and telegraph lines extending beyond the limits of a province (Can. 91, 92). It is further laid down that the Dominion may not tax provincial property (Can. 125).

The Australian constitution includes in the list of nonexclusive powers of parliament most of these save salaries of federal officers,

⁵⁵ Compare U. S. Const., Amendment 10.

criminal law and procedure, provincial executive, transportation, etc., and adds many more details, such as bounties on the production and export of goods, telephones, astronomical observations, insurance, trading and financial corporations, old age pensions, execution of process and judgments of State courts, recognition throughout the Union of the laws, acts, records, and judicial proceedings of States, emigration and immigration, external affairs, relations with the islands of the Pacific, acquisition of property, control of railways for naval and military purposes, acquisition and construction of railroads with the consent of the State, interference in industrial disputes extending beyond State limits, etc., (Aust. 51). To these may be added the exclusive powers to make laws in regard to the seat of government, all public property, and the departments of the public service taken over by the government, *viz.*, posts, telegraphs and telephones, defense, shore signals, and quarantine (Aust. 69, 52). Furthermore the Commonwealth may not tax any kind of State property (Aust. 114), lay discriminating taxes (Aust. 51 (2)), or • prohibit religious freedom (Aust. 116).⁵⁶

No such list of powers is set forth in the South Africa Act, but it serves to show what the framers of the Australian and Canadian constitutions intended to cover by the phrase "peace, order and good government," and therefore, may indicate the scope of the same clause in the South Africa Act, save as limited by the powers granted to the provincial legislatures. There are, however, distributed throughout the constitution, certain powers which are granted to the federal parliament; as to fix the constitution of the Senate after ten years (S. A. 25), the qualifications of voters for member of the House of Assembly (S. A. 35), the powers, privileges and immunities of parliament and its members (S. A. 57), the appointment, tenure, retirement and superannuation of public officers (S. A. 83), fix the salary and request the removal of Supreme Court judges (S. A. 100, 101), limit appeals to the Privy Council (S. A. 106) and provide for the levy of duties of customs and excise (S. A. 136).⁵⁷

⁵⁶ Compare U. S. Const., Amendment 1.

⁵⁷ A fairly complete list of the other parliamentary powers distributed throughout the constitutions follows:

South Africa: Regulate borrowing of money by provinces (S. A. 85); regu-

All of the constitutions contain provisions regarding money bills. In South Africa they must originate in the House and may not be amended in the Senate which, moreover, may not amend any bill so as to increase any proposed burden or charge on the people (S. A. 60). This provision is borrowed almost bodily from the Australia Act (Aust. 53), but this act allows the House to return any such bill to the Senate with the request to omit or amend any provisions therein. The British North America Act, on the other hand, merely requires that money bills shall originate in the lower house (Can.

late taking of evidence as to enactment of special laws (S. A. 88); approve the remuneration of the Auditor of Accounts (S. A. 92); provide for settling election disputes (S. A. 98 (iv)); request admission of new provinces (S. A. 149); request admission of territories (S. A. 150); make appropriations of money (S. A. 117, 125, 119); change regulations in regard to elections (S. A. 132); approve withdrawal of compensation to capitals of former colonies (S. A. 131); fix powers of Public Service Commission (S. A. 142); determine pensions otherwise unprovided for (S. A. 146); delegate the appointing power of the governor-general in council (S. A. 15); delegate the powers and functions of the governor-general in council (S. A. 16); increase membership of House of Assembly (S. A. 34); regulate payment of salaries to members of parliament (S. A. 56); fix salaries of administrators (S. A. 69); approve rules of court procedure (S. A. 107).

Canada: Alter powers and functions of governor-general (Can. 12); define privileges, immunities and powers of members of parliament (Can. 18); readjust the representation of the four provinces (Can. 51); increase number of members of House of Commons (Can. 52); alter qualifications of members and mode of their election for House of Commons (Can. 41); fix quorum of Senate (Can. 35); fix salary of lieutenant-governors (Can. 60); establish court of appeal and additional courts (Can. 101); request removal of judges of superior courts (Can. 99); fix salaries of provincial and admiralty judges (Can. 100); request admission of new colonies (Can. 146); establish new provinces (Can. 2, Act 1871); alter limits of provinces (Can. 3, Act 1871); legislate for any territory (Can. 4, Act 1871); alter customs and excise laws of each province (Can. 122); provide for audit of collection of revenue (Can. 103); alter salary of governor-general (Can. 105); appropriate for the public service (Can. 106); alter and repeal certain old provincial laws (Can. 129); provide for appointment of officers (Can. 131); perform obligations of treaties (Can. 132); provide for representation of territories (Can. 1, Act 1886); unify, with consent of the provinces, the laws of property, civil rights and procedure in certain provinces (Can. 94); legislate concerning agriculture and immigration for all of the provinces (Can. 95).

Australia: Legislate concerning detention by States of offenders against federal laws (Aust. 120); annual State inspection laws (Aust. 112); prescribe

53). All of the constitutions are alike in providing against the passage of such a bill to any purpose that has not been first recommended to the House by the governor-general (S. A. 62, Aust. 56, Can. 54). Save the origin of money bills, these provisions are novel enough to Americans whose constitution expressly provides that the Senate may amend revenue bills "as any other bills" (U. S. Const. Art. 1, sec. 7). The provisions, however, merely put in written form a custom which appears to have been followed in Great Britain for over two centuries.⁵⁸

additional justices for the High Court (Aust. 71); request removal of justices of the High Court (Aust. 72); fix remuneration of justices of the High Court (Aust. 72); provide for actions against the Commonwealth or a State (Aust. 78); make exceptions to and regulations for jurisdiction of the High Court (Aust. 73); fix quorum of federal courts (Aust. 79); confer original jurisdiction on the High Court in certain matters (Aust. 76); limit appeals to the Privy Council (Aust. 74); establish conditions of admission and representation of new States (Aust. 121); make laws for the government and representation of new territories (Aust. 122); alter the limits of a State with its consent (Aust. 123); fix compensation for State property acquired (Aust. 85); grant financial assistance to a State (Aust. 96); exclusive power to impose duties (Aust. 90); fix number, salary and offices of ministers (Aust. 65, 66); delegate the appointing power (Aust. 67); fix electoral divisions for senators (Aust. 7); fix number of senators to a State (Aust. 7); prescribe qualification of electors of senators (Aust. 8); prescribe uniform method of choosing senators (Aust. 9); legislate for elections of representatives (Aust. 10); regulate rotation of senators (Aust. 14); change method of determining representation in the House (Aust. 24); legislate for determining electoral divisions for the House (Aust. 29); prescribe qualifications of representatives (Aust. 34); legislate for elections of representatives (Aust. 31); prescribe qualifications of electors of representatives (Aust. 30); fix quorum in the House (Aust. 39); provide for determination of qualifications or elections of members of parliament (Aust. 47); fix penalty for unqualified person sitting in parliament (Aust. 46); fix salary of representatives and senators (Aust. 48); declare powers, privileges and immunities of parliament and its members (Aust. 49); make rules for conduct of its business and exercise of its powers and privileges and immunities (Aust. 50); legislate as to duties and balances of revenue paid to States (Aust. 93); provide for monthly payment of surplus revenues to States (Aust. 94); legislate with respect to navigation and shipping and State railways (Aust. 98); request removal and fix salary of Inter-State Commissioners (Aust. 103); fix powers of adjudication and administration of Inter-State Commission (Aust. 101); prohibit preference or discrimination as to railways (Aust. 102).

⁵⁸ Quick and Garran, *Const. of Aust. Com.*, p. 667, citing May's *Parl. Proc.*, 10th Ed. 542.

The South Africa Act follows the Australia Act in the excellent provision that an appropriation bill "shall deal only with such appropriation" (S. A. 61, Aust. 54), thus avoiding the addition of "riders" which might slip through parliament unnoticed and which would prejudice in these countries the right of amendment by the Senate. The provision is not found in the British North America Act, though it is said to have been a recognized constitutional rule in England for 200 years.

It is evident that if the Senate, thus shorn of power, refused to agree to a bill a deadlock might result. But the essence of parliamentary government is that the ministry obtain legislation or resign. In order to adapt parliamentary government to a bicameral legislature, the South Africa and Australia Acts have introduced a scheme not found in the Canadian constitution nor perhaps unfortunately in our own. If a bill passes the House and is rejected by the Senate or passed with amendments undesirable to the House and if after an interval (three months in Australia and at the next session in South Africa), the House again passes the bill and it is rejected or amended by the Senate as before, the governor-general may convene a joint sitting of both houses. In Australia he dissolves the parliament before the joint sitting is convened. The members deliberate together and if the bill is affirmed by a majority of the number of members present (of the total number in Australia), it is taken as duly passed by both houses of parliament. In the case of bills appropriating money for the public service, the South Africa Act provides that the joint sitting may be convened during the same session (S. A. 63, Aust. 57). Clearly it might happen that the majority in the House in favor of a bill would be the same as the majority in the Senate against the bill up to a number which would be one less than the whole number of senators. In that event the majorities would cancel each other at the joint sitting and the remainder of each house be equally divided. While this chance of a deadlock seems perfectly possible, in practice, however, it would probably seldom occur, especially in Australia where the parliament is dissolved and "goes back to the country" before the joint sitting is convened.

The last event in the history of a bill is similarly provided for in all of the three constitutions. This is the royal assent which is the point where the crown has opportunity to touch and in some degree mould legislation. When a bill has passed both houses it is presented to the governor-general for his assent, or dissent in the King's name, or reservation for the crown's pleasure, which he shall declare according to his discretion but subject to the constitution and his instructions from the King (S. A. 64, Aust. 58, Can. 55). This is thought to be a valuable charter to local and special interests in South Africa besides establishing harmony between England and the colony. The practice of limiting the assenting powers of the governor-general was first put in statutory form in 1842 (5 and 6 Vict. c. 76, sec. 40) and supplemented by several later acts.⁵⁹ The clause as to instructions is omitted from the Australia Act and appears in the South Africa Act as an amendment made by the second convention at Bloemfontein. At the same time an amendment was added that

All bills repealing or amending this section or any of the provisions of Chapter 4 under the heading "House of Assembly" and all bills abolishing provincial councils or abridging the powers conferred on provincial councils under section eighty-five, otherwise than in accordance with the provisions of that section shall be so reserved.

This is evidently a safeguard added at the instance of the weaker provinces, of which Natal was, as we have seen, the most jealous of her rights. Also all bills altering or amending any provisions of the Schedule on native affairs are to be reserved (S. A. Schedule, 25). After the governor-general receives a bill he may return the same to the originating house with any amendments which he may recommend and the house may deal with the recommendation (S. A. 64). This is borrowed from the Australia Act (Aust. 58).

The King may disallow any law within one year after the assent of the governor-general, and such disallowance takes effect from the day the governor-general notifies parliament of the same (S. A. 65). This also is taken bodily from the Australian constitution (Aust. 59) and in substance is the same as the corresponding provision of the British North America Act, except that the latter allows a period

⁵⁹ Quick and Garran, *Const. of Aust. Com.*, p. 690.

of two years within which a law may be disallowed (Can. 56). That the governor will perform this duty is insured by his appointment from the crown, who can replace him by one who will follow the royal instructions. In practice, however, though the veto of the crown is used upon the advice of his responsible ministers and of the Commons and is considered to be a living power, the King rarely disallows an act of a self-governing colony. It has become the custom to limit disallowance to acts involving the whole British Empire, such as acts contrary to a general British statute or an Imperial treaty. Thus some years ago Canada adopted a protective tariff system which she applied also to England. Great Britain threatened to disallow the act, but Canada protesting, the matter was dropped. As to the reservation of bills for the King's pleasure, the South Africa Act follows exactly the provisions of the Canadian and Australian constitutions, to the effect that a reserved bill shall have no force unless and until within one year from the day it was presented to the governor-general, he notifies parliament of the King's assent thereto; save that in Canada and Australia the period is two years (S. A. 66, Aust. 60, Can. 57). Formerly in Canada the crown directed the governor-general to reserve certain classes of acts, but this practice has been discontinued and the Dominion has thus gained more complete autonomy.

The equality of languages is as well provided for in South Africa as it is in Canada. In South Africa the laws are to be enrolled in both languages, two copies of which, one signed by the governor-general, are deposited with the Appellate Court, and in case of conflict between the two copies, that signed by the governor-general shall prevail (S. A. 67). There is a similar requirement for provincial ordinances (S. A. 91). The governor-general being an Englishman would in all probability prefer to sign the English copy, thus putting the English language in this particular above the Dutch. This slight inequality, moreover, does not appear to be overcome by the additional section which in general terms states that both shall be the official languages of the Union, enjoy equal freedom, rights, and privileges, and be used in all records and proceedings of parliament as well as in all bills, acts and notices of general public inter-

est (S. A. 137, *cf.* Can. 133). Furthermore no officer in the service of the colony shall be dispensed with at union for his lack of knowledge of either language (S. A. 145).⁶⁰

The Powers of the Provincial Legislatures

In designating the powers of the local legislatures the South African Constitution resembles the Canadian in that both set forth a list of subjects with respect to which the law-making bodies may legislate (S. A. 85, Can. 92). The latter act states that these subjects are exclusively for provincial legislation; the South Africa Act makes no such statement but provides that any act of parliament abridging any of the powers thus conferred on the provincial councils shall be reserved for the King's pleasure (S. A. 64).

The extreme local nature of the topics within the realm of provincial legislation in South Africa may be seen from the following partial list: taxation for provincial purposes, borrowing money according to rules framed by parliament, lower education for five years or until parliament otherwise provides, agriculture subject to conditions imposed by parliament, charitable institutions, municipal and other like local institutions, local works within a single province other than railways and harbors, roads and bridges within one province, fish and game preservation, penalties and imprisonment for enforcing local laws, and other subjects of legislation which parliament may delegate to the provincial councils. Moreover the acts of this body are not dignified by the name laws but are called ordinances (S. A. 85).

With these powers should be compared those of the Canadian provinces, which include most of the above, together with the following: amendment of the local constitution; appointment, tenure and

⁶⁰ The provisions on the equality of the languages are said to be due to the eloquence of Mr. Steyn, former president of the Dutch Republic. The compromise seems to have been proposed in the convention by an English delegate. This and other evidences of conciliation in the convention are believed to have killed party spirit for some time. A Boer majority, however, may be expected, it is said, for the Boers are clanish and favor their own people. Files of "South Africa," October, 1908–October, 1909.

pay of provincial officers; management of public lands belonging to the provinces; establishment of prisons; transportation and telegraph lines wholly within a province; provincial corporations; property and civil rights; provincial courts; education subject to certain restrictions as to denominational and dissentient schools (Can. 92, 93). It is especially enjoined, however, that the lands or property belonging to Canada or the provinces shall not be subject to taxation (Can. 125).⁶¹ If upon comparing the topics of provincial control in Canada with those granted to the Canadian parliament, they be found to overlap in some respects, parliament would seem to take precedence from the following clause of the section which grants power to parliament:

And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this act assigned exclusively to the legislatures of the provinces. (Can. 91).

The constitution of Australia does not set out the legislative powers of a State in detail but provides that

every power of the parliament of a colony * * * shall unless it is by this constitution exclusively vested in the parliament of the Commonwealth or withdrawn from the parliament of the State, continue, as at the establishment of the Commonwealth * * *. (Aust. 107.)⁶²

There are, however, in the succeeding sections certain duties and restrictions set forth. Thus, a State may surrender any part thereof to the Union which thereupon assumes exclusive jurisdiction; a State may levy on imports, exports, or interstate commerce charges sufficient to defray the State inspection laws; intoxicating liquids found in a State are subject thereto as if produced therein; a State may not maintain a naval or military force, tax public property of Australia or *vice versa*, coin money, make any thing but gold and silver a legal tender in payment of debts, or discriminate against residents of other States (Aust. 111-115, 117). It is further enjoined that

⁶¹ Compare *McCulloch v. Maryland*, 4 Wheaton 316; *Dobbins v. Commissioners of Erie Co.*, 16 Peters 435; *Collector v. Day*, 11 Wallace 113.

⁶² Compare U. S. Const., Amendment 10.

full faith and credit shall be given throughout the Commonwealth to the laws, the public acts and records, and the judicial proceedings of every State (Aust. 118),

and that the States shall provide for the detention and punishment of offenders against the laws of the Commonwealth (Aust. 120). Some of these provisions are familiar to Americans and are no doubt copied from our constitution; ⁶³ others recall profound discussions in our constitutional history which can not be reviewed in this paper.

In addition to the powers of the provincial councils in South Africa, given in the above comparative outlines, there are certain others which, like those last described for Australia, find no counterpart in the other constitutions. Thus the Council may recommend to parliament the passing of any law outside of its own legislative powers (S. A. 87), and it may take evidence in respect to a matter which requires a private act of parliament and submit a report thereon (S. A. 88).⁶⁴

Then follow certain provisions which resemble the corresponding sections in regard to the Union parliament: the council may not appropriate money from the revenue fund save upon the recommendation of the administrator (S. A. 89); a bill which has passed the

⁶³ Compare U. S. Const., Art. 1, Sec. 10; Art. 4, Secs. 1, 2.

⁶⁴ Most of the other powers of the provincial legislatures distributed throughout the constitutions are here brought together:

Canada: Alter powers and functions of lieutenant-governors (Can. 65); alter term of members of Quebec legislative council (Can. 72); Quebec legislative council to settle questions of qualification or vacancy (Can. 76); Quebec legislature may determine the quorum (Can. 78); legislatures of Quebec and Ontario may alter certain qualifications of members of the legislative assemblies (Can. 83); legislatures of Quebec and Ontario may alter mode of election and qualifications of voters for the legislative assemblies (Can. 84); exercise same powers as to money bills, recommendation of money votes, as parliament (Can. 90); legislate concerning agriculture of and immigration into the province (Can. 95); appropriate money for the provinces (Can. 126); alter or repeal certain old laws (Can. 129).

Australia: Consent to formation of new States by union or separation (Aust. 1); fix method of choosing senators (Aust. 9); surrender any part of State to Commonwealth (Aust. 111); alter and repeal old laws (Aust. 108); consent to alter limits of State (Aust. 123).

South Africa: Alter or repeal old laws (S. A. 135).

council is to be presented to the governor-general in council for his assent, dissent or reservation, which he must pronounce within one month, and an ordinance so reserved has no force unless or until within one year the governor-general in council proclaims his assent (S. A. 90); and the laws receiving such assent shall be enrolled in both English and Dutch and deposited with the Appellate Court (S. A. 91). Finally, "all powers, authorities and functions lawfully exercised at the establishment of the Union by * * * local authority shall be and remain in force" until changed by parliament or council (S. A. 93).

We are now perhaps in a better position to discuss the broad question of division of powers which was raised above, and to consider the position of the provinces in the various constitutional systems. In the first place it will be noted that in South Africa the organization of the provinces and their fundamental laws are to be found in the South Africa Act. They have no local constitutions such as the provinces in Canada and the States in Australia brought with them into the Union (Aust. 106, Can. 92 (1)) and still enjoy. Hence the South African provinces have no power of amendment as is expressly granted to the political divisions of Canada and Australia in respect to their local constitutions. Moreover, the South Africa Act provides that an ordinance of a provincial council shall have effect as long and as far only as it is not repugnant to any act of parliament (S. A. 86). Furthermore, the power of amending any portion of the South Africa Act lies in the Union parliament (S. A. 152) subject to the restriction that bills abridging powers of provincial councils shall be reserved for the King's pleasure (S. A. 64). Thus it is seen that the province in South Africa is not dignified by a constitution; it has no control over private law; its ordinances are subject to the acts of parliament; and the same agent may with the consent of the crown shear it of the few powers it possesses. Centralization is further achieved by the Union government taking over all public lands, works, revenues, debts, etc. Indeed this form of government is likely to create a unity of feeling instead of foster-

ing local jealousies. It has been said ⁶⁵ that South Africa is not a pure case of unification because the provinces are represented in the Senate equally (S. A. 24) and in the House not strictly according to the population (S. A. 34). Still after the members of the House reach 150 the representation in the provinces is to be in uniform proportion throughout the Union. This may ultimately eradicate provincial boundaries so far as the House of Assembly is concerned. Furthermore the Senate, after ten years, will also be in the hands of the House; for at that time its constitution is subject to alteration by the parliament in which the House is the dominating chamber. Thus as has been humorously remarked ⁶⁶ South Africa would then be a country without a second chamber. If this is not unification at once it bids fair to be unification indeed in the future, with the popular house supreme. It can hardly be questioned that the residuum of power rests in the lower chamber of the Union.

As to the relative position of the provinces in Canada the British North America Act would, as we have seen, appear to be clear enough. The provinces are empowered to amend their constitutions (Can. 92) probably without extending their own powers, and Nova Scotia and New Brunswick continue the same executive and legislative organizations which they brought into the union (Can. 64, 88). Ontario and Quebec, however, have the organization of these departments partly provided for in the British North America Act. These facts together with the express division of powers between the Dominion and the provinces and the probable precedence of parliament in the case of overlapping powers (Can. 91) show without more that the Canadian provinces have a much more dignified position in the system of government than the provinces in South Africa. The real relation, however, of the provinces to the Dominion, was long a matter of discussion after the passage of the act, but it is now judicially settled that within the limits of subjects (Can. 92) and areas as laid down by the constitution the legislative power of the prov-

⁶⁵ Mr. Duncan, legal adviser of the Transvaal delegation to the national convention, "South Africa," Mar. 20, 1909, p. 612.

⁶⁶ "South Africa," Mar. 13, 1909, p. 584.

inces is exclusive and supreme.⁶⁷ In the Liquidator's case the Privy Council said:

The appellants * * * maintained that the effect of the statute (B. N. A. Act. 1867) had been to sever all connection between the Crown and the provinces, to make the government of the Dominion the only government of Her Majesty in North America, and to reduce the provinces to the rank of independent municipal institutions. For these propositions their Lordships have been unable to find either principle or authority. * * * The object of the Act was neither to weld the provinces into one nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, intrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing between the Dominion and the provinces all powers, executive and legislative, and all public property and revenues, which had previously belonged to the provinces, so that the Dominion government should be vested with such of those powers, property, and revenues as were necessary for the due performances of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government. But, in so far as regards those matters which by section 92 are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion and as supreme as it was before the passing of the Act. * * * The Act of the Governor General and his council in making the appointment was, within the statute, the Act of the Crown; and a Lieutenant Governor, when appointed, was as much the representative of Her Majesty for all purposes of provincial government, as the Governor General himself was for all purposes of Dominion government.

It is to be noted, however, that by the constitution (Can. 56, 90) the crown may not veto a provincial act save through the governor-general. Moreover, the British North America Act has kept alive for some of the provinces (Can. 65, 129) prior acts of the Imperial parliament which are now considered a part of the constitutions of the provinces.⁶⁸ Though the powers are expressly divided in the constitution there has been some debate on whether there are any residual powers and if so whether they belong to the central or the provincial legislature. Some believe there was intended to be no such

⁶⁷ *Hodges's Case*, 53 L. J. P. C. 1; *Liquidator's Case*, 61 L. J. P. C. 75; Clements, *Can. Constitution*, p. 137.

⁶⁸ Clements, *Can. Constitution*, pp. 106, 107.

residuum, but a definite division. This is the argument of the States' rights school. The general view, however, and the one supported by practice, is that powers not granted by express words or by necessary implication to the provinces, belong to the central government. The question has never been worked out in the courts because the central government may disallow provincial acts (Can. 56, 90). This power, however, is used very cautiously and is exercised when the provincial laws are *ultra vires*, conflict with laws of parliament, or affect interests of the Dominion generally.⁶⁹ Thus a Chinese exclusion act passed by British Columbia was disallowed by the Dominion Government on the ground of involving Canada or England in trouble with China.

The Canadian provinces as we have seen are also more distinctly marked than the South African provinces in point of representation, and though the former are not equally represented in the Senate, this body, it will be recalled, is an appointive chamber. Furthermore, there is no provision in the British North America Act that the Canadian parliament may either amend that act or alter the constitutions of the provinces which latter may, as we have seen, from time to time alter their own fundamental laws.⁷⁰

In one important matter, however, the Canadian provinces have less independence than either Australian or American States. The latter have exclusive power to regulate internal trade and commerce; for in Australia and America the central power is limited to the control of trade and commerce with other countries and among the several States (Aust. 51 (i), U. S. Art. 1; sec. 8, subsec. 2), while the grant to the Canadian parliament is in general terms "the regulation of trade and commerce" (Can. 92 (2)) whether wholly within or partly without the provinces.⁷¹ Consequently, if the South Africa government is scarcely an example of pure unification, *a fortiori* the Canadian is by no means such. Neither is it a true federation of

⁶⁹ Munro, Const. of Can., p. 175.

⁷⁰ Munro, Const. of Can., p. 229 *et seq.*

⁷¹ Reg. v. Justices of King's County, 2 Pug. (N. Bruns.) 535; City of Fredrickton v. Reg., 3 S. C. R. 505; Quick and Garran, Const. of Aust. Com., pp. 542, 543.

States of limited sovereignty, for they have not equal representation in the Senate and the organization of some of them is laid down in the constitution in detail.

In still stronger contrast to the South African provinces are the States of the Australian Commonwealth. The latter are distinct from the Union government much as are our own States, from which they are copied. They have independent constitutions (Aust. 106) which they may amend and consequently their organization is not set forth in the Australia Act. The constitution of each State is an act of the Imperial parliament or an act of the State parliament pursuant to a specific power conferred by the Imperial parliament.⁷² Since their organization is not set forth in the central constitution and parliament is not given the power to alter the State constitutions, their constitutions can not be affected by the Union parliament save by altering the Australia Act by an amendment inconsistent with their constitutions and then only as will be shown later, through a *referendum* to the people of the States. Thus the entity of the individual States is well safe-guarded. A more difficult question, however, is the division of powers between the Union and the State legislatures. As already shown the line is not so distinctly drawn as in the British North America Act. Since the State constitutions and the powers and laws thereunder existing prior to the union were continued in the States after the date of union, save where in conflict with the constitution of the Commonwealth, the States have a residuum of legislative authority under the general terms in which it was originally conferred upon them individually.⁷² But when this jurisdiction coincides with some of the subjects listed in section 51, the question is, does the State or the Commonwealth have the power, or is it concurrent and exercisable by the State until the Commonwealth takes control, when under section 109 and clause 5 of the preamble the State law would be void in so far as inconsistent with the federal statute? The reasons for believing that at least some of the powers set forth in section 51 are concurrent, are, because this section does not in terms make them exclusive powers, while section 52 names "exclusive" powers, and because it is entirely con-

⁷² Clark, Aust. Const. Law, p. 15.

ceivable that the original jurisdiction of the States covered some of the subjects in section 51. There are, however, among the subjects in section 51 powers which it is believed no colony exercised prior to the union, such as trade and commerce with other countries, external affairs, relations of the Commonwealth with the islands of the Pacific, etc. Moreover, there are subjects which imply exclusive handling by the Commonwealth, for instance, those just named; bounties that shall be uniform throughout the Union; naval and military defense of the Commonwealth; borrowing money on the credit of the Commonwealth; banking and insurance, other than State; recognition of public acts, records and judgments throughout the Commonwealth, etc. Finally the subjects remaining outside of these two classes may reasonably be considered as belonging to parliament alone on the grounds that topics not mentioned are excluded, and that subjects which must in their nature belong to parliament alone are mingled, as we have seen, with ones whose nature is doubtful. Hence, of the subjects set out in section 51, the States may not, it seems, enjoy those which they never before exercised, nor those which necessarily imply federal control, but may perhaps have at least concurrent jurisdiction over the remainder. Beyond these subjects, however, and those granted to parliament in section 52 and elsewhere it appears the States may rightfully claim the residuum of power. In this connection it may be noted that the federal government in Australia cannot disallow State laws, as it may in Canada.

An interesting line of cases has arisen in Australia involving the general question of the division of powers and in particular whether a State may impose an income tax on the salaries of federal servants. Higgins,⁷³ points that the early cases⁷⁴ followed the reasoning in *McCulloch v. Maryland*; for he considers that the question is a corollary of the principle underlying the latter case that "the sovereign power of State taxation ends where the sovereign power of federal legislation begins." Consequently the High Court of Australia disallowed the income tax as did the United States Su-

⁷³ 18 Harvard Law Rev. 559.

⁷⁴ *d'Emden v. Pedder*, 1 Com. L. Rep. 91; *Deakin v. Webb*, 1 Com. L. Rep. 585; but see *contra*, *Wallaston's Case*, 28 Vict. L. Rep. 357.

preme Court in *Dobbins v. Erie County*.⁷⁵ Now, however, this has been overruled by a later case⁷⁶ in which it was held that a federal officer may properly be assessed under a Victorian Income Tax Act. It was said the American and Australian constitutions were not enough alike to warrant similar interpretations on this point. Query, which way will the courts go in South Africa where there seems to be no prohibition as to taxation?

In a word, the comparison shows that South Africa stands at one extreme as a parliamentary unification with practically all power vested in the Union legislature; that Canada is an incomplete federation with divided powers, the central government claiming the residual powers; that Australia stands at the other extreme as a type of federation with the States claiming the residuum of legislative authority.⁷⁷

The Power of Amendment

Perhaps the most important power which may be granted to a legislative body is that of amending the fundamental law on which its own existence rests. There is no such general power granted to parliament in the British North America Act nor to Congress in our own constitution. The Canadian parliament is, however, as we have seen, granted power to alter particular provisions of the constitution, such as those in regard to the salary of the governor-general (Can. 105), the salaries of lieutenant-governors (Can. 60), the quorum of the Senate (Can. 35), the distribution, qualifications, electors and elections of members of the House of Commons

⁷⁵ 16 Peters 370.

⁷⁶ *Webb v. Outtrim*, (1907) App. Cas. 81; see 20 Harvard Law Rev. 494.

⁷⁷ The local desires in the South Africa colonies concerning unification or federation, were quite diverse. Natal favored federation so as to preserve her identity and better safeguard her rights. Only five members of the convention are said to have favored federation and these were Natal delegates. On the other hand, the Cape and the Transvaal favored unification, the Orange River Colony being more or less neutral. Rhodesia being a farming district cared little for federation or unification. Unification it is thought will do away with conflicts between the central and the State governments, which the convention thought had retarded the progress of Canada and Australia. Files of "South Africa," October, 1908-June, 1909.

(Can. 41), etc.; etc. Further than this the Canada Act can only be amended by an act of the British parliament. But in the South Africa Act general amending power is granted to parliament which may within certain limits exercise it by merely passing a law (S. A. 152). The restrictions are: that no period fixed in the constitution be changed during such period; and that the number of members in the House of Assembly and the method of increasing that number (S. A. 33 and 34), the negro franchise in the Cape (S. A. 35), and the equality of the English and Dutch languages (S. A. 137) shall not be altered save by two-thirds of the total number of members of both houses at a joint sitting. Moreover all bills amending the provisions concerning the royal assent, the House of Assembly in chapter four, and the abolition of the provincial councils or their powers, shall be reserved for the King's pleasure (S. A. 64). Thus it is seen that the bills which must be reserved are constitutional bills, that is, such as infringe upon the powers of the constitutional authorities. In Australia general power to amend the constitution is given partly to parliament and partly to the people. The proposed amendment must be passed by a majority of each house of parliament and must then be submitted to the electors of the Commonwealth. Or if both houses twice fail to agree on such a law which has twice passed the originating house, it may be submitted to the electors as above. If in a majority of the States a majority of the electors voting, and also a majority of all the electors voting, approve the bill, it is presented to the governor-general for the assent of the crown. But in matters affecting a State, such as its proportionate representation in parliament, its number of members in the lower house, its boundaries, etc., the bill must receive a majority of the electors voting in that State (Aust. 128). In the United States, it will be remembered, the proposed amendment must be accepted by three-fourths of the States in convention or by legislature (U. S., Art. 5).

Aside from the great question whether the English parliament may thus grant away to a subordinate body the right to alter its own act, the fact that the Union parliament of South Africa may exercise this power by a mere act of legislation is a strong indication of

the English notion that the legislature should be the supreme branch of the government.

At this point it may be recalled in regard to the amendment of bills themselves that the Senate may not amend any money bills (S. A. 60, Aust. 53), and the governor-general may return to the originating house with recommendations as to amendments any bill presented to him (S. A. 64, Aust. 58).

The Judicature

In the South Africa and the Australia Acts the subject of the judicature is treated in detail, whereas in the British North America Act it is covered in a half dozen paragraphs. In South Africa the judicature is entirely taken over by the central government, the provinces having, so far as the constitution shows, practically no hand in the administration of justice, save perhaps the execution of decrees. This is in strong contrast to the arrangement in Australia and Canada by which the States and provinces have their own judiciary and is a further commentary on the unity of South Africa.

There is one high court called the Supreme Court of South Africa which is divided into several divisions: the Appellate Division, the Provincial Division, and the Local Division. The Supreme Court consists of a chief justice of South Africa and the other judges of the several divisions (S. A. 95) who are largely taken from the existing supreme courts of the colonies. All additional judges or successors to the bench are appointed by the governor-general (S. A. 100) as is the case in Australia (Aust. 72). In the latter country the judicial power is vested in federal and State courts, there being one federal supreme court called the High Court of Australia; and such other federal courts as parliament may create or invest with federal jurisdiction. In South Africa the judges receive the same salaries as they previously had and new appointees such as parliament may prescribe (S. A. 99, 100).⁷⁸ Parliament has the same power in Australia, but in neither country may the remuneration be diminished during the term of office (Aust. 72).

Vacancies owing to the absence, illness, or other incapacity of the

⁷⁸ Compare U. S. Const., Art. 2, Sec. 2, and Art. 3, Sec. 1.

chief justice or appellate justices may be filled temporarily by appointment of the governor-general in council from any of the judges of the Supreme Court (S. A. 97). In the case of any vacancy occurring save in the Appellate Division, the governor-general may in his discretion postpone filling the vacancy until parliament determines whether a reduction in the number of judges be to the advantage of the public interest (S. A. 102). None of the judges may be removed save by the governor-general in council upon an address from parliament charging misbehavior or incapacity (S. A. 101). This is copied exactly from the Australian constitution (Aust. 72).⁷⁹

The Appellate Division is the only central court in South Africa and, except the Privy Council in England, is the court of last resort. It is composed of the "chief justice of South Africa, two ordinary judges of appeal and two additional judges of appeal" (S. A. 96). The "additional judges" are judges of the Provincial Division who are assigned to duty on the appellate bench by the governor-general in council, when under section 110 a quorum of five judges is necessary (S. A. 110). The Appellate Division sits at Bloemfontein, thus forming the third member of the three-fold capital. But for the convenience of suitors it may sit elsewhere within the Union (S. A. 109). It corresponds to the High Court of Australia which consists of a chief justice and at least two justices, or more, as parliament prescribes (Aust. 71) and to the Supreme Court of Canada which numbers six judges, and was created by an act of the Canadian parliament in accordance with a provision in the British North America Act (Can. 101). The Canadian parliament has also established under the same provision a Court of Exchequer which has jurisdiction of claims against the crown (that is, Canada), revenue causes, etc., a Maritime Court, and courts for the trial of controverted elections.⁸⁰ In the South Africa Act there is no provision for prosecuting claims against the Union, but there is a clause in the Australian constitution by which parliament is granted power to pass laws on the matter (Aust. 78).⁸¹

⁷⁹ Compare U. S. Const., Art. 2, Sec. 4.

⁸⁰ Munro, *Const. of Can.*, pp. 216, 217.

⁸¹ Compare U. S. Const., Amendment 11, which cleared up a supposed ambiguity in Art. 3, Sec. 2.

The Provincial Division is composed of the four supreme courts of the colonies, the judges being retained at the same salaries, and the pending cases being taken over in their entirety (S. A. 98, 99, 116).

The third part of the Supreme Court is the Local Division which comprises the frontier courts in the eastern districts of the Cape, in Griqualand and Witwatersrand, and the several circuit courts (S. A. 98). In Canada, as already mentioned, the provinces by virtue of their authority to administer local justice (Can. 92 (14)) have their own superior, district and county courts whose judges are appointed generally by the governor-general from among the bars of the respective provinces. This mode of appointment was to continue until property and civil rights and procedure were made uniform in Ontario, Nova Scotia and New Brunswick, but in Quebec, where the civil law except as to crimes prevails, the judges are always to be appointed from the local bar (Can. 96, 98, 97). The superior judges hold office during good behavior but are removable by the governor-general on an address of parliament, and the salaries of nearly all of the judges are fixed by parliament (Can. 99, 100). The power to appoint and remove judges, establish additional courts, fix salaries, etc. (Can. 96, 99, 100, 101) is a restriction on the general power of the provinces to administer justice within their territories (Can. 92 (14)). In Australia, the State courts are not provided for in the constitution as they were continued as constituted under the previous State organizations (Aust. 106).

The jurisdiction of the various divisions of the South African Supreme Court is set forth in the act. The jurisdiction of the Appellate Division is given in terms of appeals and appears to include under the constitution no express original jurisdiction. In the Australia Act the jurisdiction of the High Court is given as both appellate and original. In the British North America Act no mention is made of jurisdiction, but parliament is given and has used, as already stated, the power to create a "general court of appeal for Canada and * * * any additional courts. * * *" (Can. 101), and has likewise exercised the implied power to define their jurisdiction. In South Africa, roughly speaking and excluding the exceptions in section 103 due to amendments in the Bloemfontein

convention, all appeals which at the establishment of the Union would have lain to the supreme courts of the colonies or from them or from any court of the native territories, to the King in council, shall lie *only* to the Appellate Division, without limit as to the amount in controversy; and all appeals which would have lain to "a superior court in any of the colonies," shall lie to the Provincial Division. From judgments on appeal rendered by the Provincial Division appeals lie only to the Appellate Division and then only upon special leave of the latter court (S. A. 103, 104, 105). In Australia the High Court receives appeals from any other federal court or court exercising federal jurisdiction, or any other State court from which an appeal formerly laid to the Queen in council, from the Inter-State Commission on questions of law, etc. (Aust. 73). The original jurisdiction of the High Court resembles the jurisdiction, both appellate and original, of the United States Supreme Court⁸² from which it was largely copied. It is, however, optional with parliament to confer original jurisdiction on the High Court in several matters over which our Supreme Court has appellate jurisdiction under the constitution, namely questions under the constitution or laws of parliament, of admiralty and maritime jurisdiction, and about the same subject-matter claimed under the laws of different States (Aust. 75, 76); while no mention is made of disputes between States or citizens and foreign states or aliens. The first matter raises the query whether the High Court may declare an act of parliament unconstitutional. If the provision which is substantially the same as the corresponding one in the constitution of the United States, is similarly interpreted, it would seem the High Court should be regarded as having that power. In the English system of government where the legislature is considered to be supreme, this interpretation introduces an innovation. It should be noted, in this connection, that the South Africa Act by which the Union parliament, especially the lower chamber, is given almost supreme power, expressly confers, as above shown, on the Provincial

⁸² U. S. Const., Art. 3, Sec. 2. The Australian Constitution did not adopt amendment 11, to the American Constitution due to the decision in *Chisholm v. Georgia*, 2 Dall. 419.

and Local Divisions of the Supreme Court the jurisdiction to declare on the constitutionality of a provincial ordinance or law, apparently notwithstanding that it has received the assent of the governor-general in council. The Australian parliament furthermore may define in respect to any of the matters of original jurisdiction mentioned in the constitution, the jurisdiction of any other federal court or invest a State court with federal jurisdiction (Aust. 71, 77). Thus the Australian constitution empowers parliament to accomplish what it has been held Congress cannot do, namely, vest federal jurisdiction in courts not of its own creation.⁸³ Finally the trial on indictment of any offence against any federal law must be by jury (Aust. 80).

The Appellate Division in South Africa has a differential quorum depending on the size of the lower court from which an appeal comes. If the lower court consists of two or more judges, five judges of the Appellate Division form a quorum, but on hearing appeals from a single judge, three judges of the Appellate Division are a quorum. No appellate judge, however, may sit on appeal in a case heard before him below (S. A. 110). In Australia the matter of a quorum is left entirely to parliament (Aust. 79).

The process of the Appellate Division as well as its judgments and orders are given full force and effect in every province, where they are to be executed as if they issued out of courts of the Provincial Division (S. A. 111). In this respect the South Africa Act apparently has gone further than any other colonial constitution to overcome a difficulty which the United States has experienced, namely, the refusal of a State to execute the decree of a federal court. Thus it will be remembered how Georgia treated with the utmost indifference and contempt the writs of the United States Supreme Court in the cases growing out of the Cherokee Indian troubles.⁸⁴ If the President does not refuse, as Jackson did in these cases, this court can execute its own decrees when a State refuses to do so. The situation in South Africa, however, is not exactly the same since the provincial courts are Union tribunals and the provincial executives are subordinate to the governor-general.

⁸³ See 1 Kent Com. 400 *et seq.*

⁸⁴ Van Holst, Const. Hist. of U. S., Vol. 1, p. 453.

The jurisdiction of the Provincial and Local Divisions includes the original jurisdiction exercised by the corresponding courts at the date of union, together with jurisdiction in cases where the Union government is a party, the validity of a provincial ordinance is in question, or until parliament otherwise provides, where the validity of elections of members of the House of Assembly and provincial councils is affected (S. A. 98). The question of elections, it will be recalled, is in Australia settled by the house of which he is a member (Aust. 47). In Canada this question was formerly within the jurisdiction of the provincial houses and of the Dominion House of Commons, but the jurisdiction was later conferred by them under section 41 on the courts of the provinces as well as of the Dominion.⁸⁵ The interesting question in this connection is whether the crown under its prerogative right to hear appeals from colonial courts could review a decision on a controverted election. Clements⁸⁵ and Munro⁸⁶ cite *Théberge v. Landry* (46 L. J. R. C. 1) as authority that the crown can not review such a case.

The various courts of the Provincial and Local Divisions are provided with convenient machinery for the transaction of business. A civil suit, for example, pending in one court may, when it is made to appear that it may be more conveniently or fitly determined in another court of the division, be removed to the other court which will proceed with the suit as if it had originated there (S. A. 113). Moreover, the South Africa Act has again gone further than the Australia constitution in overcoming another American difficulty; for it has not only provided, as we have seen, that the process and judgments of the Appellate Division shall be executed throughout the provinces as if they were judgments of the Provincial Division, but it has created a method by which the judgments of any court of the Provincial Division must be executed by the court in any other province. If the party in whose favor any judgment or order has been made by the one court deposits with the other court an authenticated copy of the judgment or order and proof that the same has not been satisfied, the latter court will

⁸⁵ Clements, *Can. Constitution*, pp. 125-127.

⁸⁶ Munro, *Const. of Can.*, p. 222.

issue process for the execution of the judgment or order which shall be executed as if issuing from the latter court (S. A. 112). This should be compared with the "full faith and credit" clause of the American constitution (U. S. Art. 4, sec. 1) which clause was copied by Australia (Aust. 118). In the United States, it will be recalled, no execution will be issued by the courts of one State on a judgment rendered in the courts of another State until a new suit has been instituted and tried upon the judgment in the former State. Australia has attempted to overcome this difficulty by providing that Parliament may legislate on the recognition of the judicial proceedings and the execution of the process and judgments of State courts (Aust. 51 [24-25]⁸⁷). It would seem that South Africa has effectively provided in its constitution against the American difficulty by the method above outlined.

The constitution not only provides for the court, but also for the bar, a detail which makes the instrument resemble an ordinary statute. The object of the provisions concerning the bar is to extend the rights enjoyed by advocates and attorneys practicing before the old courts, to the newly constituted tribunals (S. A. 115). No similar provision is found in the Australia or the Canada Act.

Most of the English colonies, as is well known, enjoy a right of appeal to the King in council; that is, the judicial committee of the Privy Council. This is the court of appeal for the Empire outside of England, Ireland, and Scotland, whose court of appeal is the House of Lords. Formerly the judges of the Privy Council were all Englishmen, but now some advance has been made by allowing a Dominion judge to sit with the Privy Council on appeals from his own colony. The Privy Council, therefore, is a bond between the mother country and her colonies which England desires to maintain and strengthen for the closer union of the Empire. It is interesting, therefore, to compare the constitutions on this point. The South Africa Act provides:

⁸⁷ Compare U. S. Const., Art. 4, Sec. 2, Subsec. 2. The Australian Constitution by making the procedure judicial obviates a difficulty of inter-state rendition experienced in the United States where the return of a fugitive is an executive function.

There shall be no appeal from the Supreme Court of South Africa or from any division thereof to the King in Council, but nothing herein contained shall be construed to impair any right which the King in Council may be pleased to exercise to grant special leave to appeal from the Appellate Division to the King in Council. Parliament may make laws limiting the matters in respect of which such special leave may be asked, but Bills containing any such limitation shall be reserved by the Governor-General for the signification of His Majesty's pleasure. (S. A. 106.)

The constitution of Australia reads:

No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

* * * * *

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitations shall be reserved by the Governor-General for Her Majesty's pleasure. (Aust. 74.)

The British North America Act has no similar provision, but a statute of the Dominion⁸⁸ establishing the Supreme Court reads:

The judgment of the Supreme Court shall in all cases be final and conclusive, and no appeal shall be brought from any judgment or order of the Supreme Court to any court of appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to Her Majesty in Council may be ordered to be heard; saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal prerogative.

These last words have been held to save untouched the crown's prerogative to allow an appeal from the Supreme Court, save in cases of controverted elections, referred to above.⁸⁹

⁸⁸ 38 Vict., c. 2, sec. 47.

⁸⁹ Munro, *Const. of Can.*, pp. 221, 222; *Théberge v. Landry*, 2 App. Cas. 102. As to appeals under the Canadian Insolvent Act, see *Cushing v. Dupuy*, 5 App. Cas. 409.

As regards federal courts, therefore, it is seen that in Canada the right of appeal to the crown in council is practically unlimited, in Australia no appeal can be taken on constitutional questions, a limitation secured by Australia only after firm resistance to strong English protests, and in South Africa appeal from the Appellate Division is unlimited. The South Africa Act, however, provides that nothing therein shall affect the right of appeal under the Colonial Courts of Admiralty Act, 1890.⁹⁰ There is no such provision in the other constitutions, and the relation of the Admiralty Act to the subsequent Australian Constitution Act is at least doubtful.⁹¹ The institution in South Africa of the Appellate Division from which alone an appeal may be taken to the Privy Council, will tend to lessen the number of appeals to the latter court by adding, it is said, about fifty per centum to the cost of prosecuting such an appeal. The interesting question is, may appeals be taken from provincial courts either directly to the King in council, or to the federal courts, that is, is there an alternative right of appeal? In Canada this right appears still to exist, at least for the province of Ontario;⁹² in Australia, however, section 74 above quoted and section 73, which, as we have seen, provides for appeals from State and federal courts to the High Court, are believed simply to furnish an alternative right of appeal to the High Court, the prior right of appeal to the Crown in council still remaining unimpaired to the States.⁹³ The inconvenience of this arrangement has already been proved in the cases above noticed, where the question of the power of a State to tax the salary of a federal officer came up in the High Court, which refused an appeal to the Privy Council. A similar case came up again in a State court and an appeal was had to the Privy Council which took a position just opposite to that of the High Court. The same thing is likely to occur in Canada. The South Africa Act by prohibiting appeals from any division of the Supreme Court save from the Appellate Division, provides expressly against such confusion in the interpretation of the law.

⁹⁰ 53 & 54 Vict., c. 27.

⁹¹ Quick and Garran, *Const. of Aust. Com.*, p. 798.

⁹² Munro, *Const. of Can.*, p. 96.

⁹³ Quick and Garran, *Const. Aust. Com.*, pp. 738, 742, 754.

In Canada the Supreme Court has an additional function. The governor-general or the legislature may refer a pending piece of legislation to the Supreme Court for interpretation. This was attempted in the United States in Washington's time but failed. Inasmuch as it might tend to embroil the court in politics, besides throwing upon the court the task of pronouncing an abstract opinion, the practice is of doubtful value and so far as known is not in use in Australia, nor is it provided for in the South Africa Act.

The administration of justice throughout the Union is to be under the control of one of the ministers of state who will have in general all of the powers, authorities, and functions of the former attorneys-general of the colonies, except that the prosecution of crimes and offenses shall be generally vested in an attorney-general of the province, appointed by the governor-general in council (S. A. 139).

Public Finance

Each constitution contains a chapter on financial arrangements including revenues, liabilities, assets, etc. This is necessary where several colonies once independent of each, with their own fiscal systems, public moneys, properties, debts, etc., have thrown in their lot together to form a union. In such event, the colonies seldom join the union without driving some bargain for the recognition more or less completely of the treasure of the one and the debts of the other, and these bargains may be set out with great detail, in the constitutions. The disposition of the public property of the colonies is usually the first arrangement made. In South Africa all stocks, cash, bankers' balances, securities, crown lands, public works, mining and mineral rights, harbors and railways, and generally all public property, movable or immovable, are turned over to the Union (S. A. 117, 121-123, 125). This arrangement fell hardest on the Transvaal which, owing to its rich mining districts, was in the best financial condition of any of the colonies, and it at least bespeaks the generous spirit in which the Union was conceived. In Australia such generosity on the part of the States is lacking; for the departments of the public service in each colony taken over by the Commonwealth, namely, posts, telegraphs, telephones, naval and military defense, shore signals, quarantine and customs and excise, carry with them

all of the State property used exclusively in connection with those departments, while property not exclusively so used, as for example where partly used by a department not taken over, may be acquired by the union at its option, but in either case compensation was required to be paid for such property as passed to the Commonwealth. Moreover the union was to assume the obligations of the State in respect to the departments transferred (Aust. 85). In Canada all stocks, cash, bankers' balances, securities, certain enumerated public works and property passed to the Dominion (Can. 107, 108).

Provision was made in Australia for retaining or pensioning the officers in the transferred departments (Aust. 84). A similar provision as to officers in the public service of the colonies occurs in the South Africa Act, save that the matter is to be handled by a "Public Service Commission," perhaps comparable to our Civil Service Commission, to be appointed by the governor-general in council (S. A. 140-146). In Canada certain provincial officers whose powers became federal at the union, became federal officers (Can. 130).

In all three countries the central government takes over the revenues, in South Africa without limitation (S. A. 117), in Australia the State of Western Australia because of her undeveloped and over-taxed condition retaining the right for five years to impose customs duties on a gradually decreasing scale (Aust. 81, 95), and in Canada each province retaining its customs and excise laws until altered by parliament, New Brunswick retaining for a time even her lumber dues (Can. 122-124). In the last country such duties and revenues went to form a provincial revenue fund for the local public service (Can. 126). The revenues taken over by the central government go to form certain funds from which appropriations are made for the purposes of the union. In South Africa two such funds are to be established, the railway and harbor fund to be maintained by and used for purposes of railways, ports and harbors, and the consolidated revenue fund to be derived from all other revenues and appropriated for union purposes generally (S. A. 117). Previous to the Bloemfontein convention, the charges on this fund were, first, cost and expenses of collection, second, interest on the public debts of the colonies, and, afterward, expenses of the public service. But at this

convention these sections were amended so that the first charge is to be the interest on the public debts of the colonies, and any sinking funds constituted by law (S. A. 119). Similar consolidated revenue funds were formed in Canada and Australia (Can. 102, Aust. 81) and in both countries the first charge thereon is the cost and expense of collecting and receiving the same (Can. 103, Aust. 82). After this in Australia, it is to be applied in the first instance to the payment of the expenditures of the Commonwealth. In Canada, on the other hand, several other charges are indicated in order of priority: interest on the public debts of the provinces, salary of the governor-general, and finally expenses of the public service (Can. 104-106). But in all of the three Dominions, as in the United States, no money may be withdrawn from the funds save under appropriation made by law (S. A. 120, Aust. 83, Can. 106, U. S. Const. Art. 1, sec. 9).

The debts of the colonies are taken over by the central government (S. A. 124, Can. 111, Aust. 105), but in Australia the States indemnify the government for the debts. The consolidated debt of the Union is estimated at about £107,000,000 of which about £90,000,000 are reproductive, and hence the financial condition is not considered weak. A Union stock will probably be created and put on the London market.⁹⁴ As to the remaining financial relations of the Union to the provinces, various plans are outlined in the constitutions. In South Africa the whole matter was not fought out in convention, but simply left to be settled by a commission consisting of one representative from each province and an officer from the Imperial service. Their duty is "to institute an inquiry into the financial relations which should exist between the Union and the provinces." Meanwhile the finances are to be carried on under a *modus vivendi* laid down in the constitution (S. A. 118). An interesting provision, which shows something of the tenacity, if not commercialism, with which each colony bartered for the location of the capital within its borders, provides for compensation to the capitals of the provinces on account of "diminution of prosperity or decreased ratable value by reason of their ceasing to be the seats of government of their respective colonies." Accordingly, two per

⁹⁴ "South Africa," Feb. 27, 1909, pp. 451, 453.

centum per annum on their municipal debts is to be paid Pietermaritzburg and Bloemfontein for twenty-five years, and to Cape Town and Pretoria, if the commission so recommend, not less than one per centum. But after the tenth year the grant may be reduced or withdrawn (S. A. 133). The last clause is believed by some to point to the time when one of the latter cities shall be the only capital.

In Australia, however, the rest of the financial arrangement is set forth in the constitution something as follows. At the union the collection and control of customs and excise duties passed over to the Commonwealth and for the first ten years thereafter only one-fourth of the net amount goes to defray the expenditures of the union, while the balance is paid to the several States or applied towards the payment of the interest on their debts assumed by the union (Aust. 86, 87). Besides the compensation for the departmental property taken over by the Commonwealth, for ten years after the union or until parliament otherwise provides, the parliament may grant financial assistance to any State (Aust. 96). The object of this provision is to tide over the transitional period of finance. During the same period and until uniform duties of customs were imposed which was to take place within two years after the union the net balance of revenues collected under the old colonial laws was turned over monthly to each colony (Aust. 88, 89, 97). At the end of the two years the colonial customs laws ceased and the power to impose customs duties became vested exclusively in parliament (Aust. 90)⁹⁵ and for the succeeding five years there was a customs arrangement whereby the balance of the revenues collected in each State was paid over to that State. At the end of this period parliament was empowered to provide for the monthly payment to the several States of all surplus revenue (Aust. 93, 94).

In Canada the arrangement was somewhat different from that in Australia. In the first place the provinces retained all of their lands,⁹⁶ mines, minerals and royalties, certain enumerated public

⁹⁵ Compare U. S. Const., Art. 1, Sec. 10, Subsec. 2.

⁹⁶ The title is in the crown, but the use is in the province. *St. Catherine's Milling Co. v. Reg.*, 14 App. Cases 46.

property not turned over to the union, and assumed their individual debts above a named sum, together with certain assets connected therewith (Can. 109-117). In addition, annual payments the amounts of which are fixed in the constitution, were to be made to each province, besides an annual grant to each province equal to eighty cents per head of population "in full settlement of all future demands." New Brunswick, moreover, received an additional allowance of \$63,000 per annum for a period of ten years (Can. 118, 119) and the division and adjustment of the debts, property and assets of Upper and Lower Canada were referred to three arbitrators⁹⁷ (Can. 142).

South Africa has followed Australia and Canada in the requirement that there shall be free trade between the provinces (S. A. 136, Aust. 92, Can. 121). The free trade provision, however, was added in the Bloemfontein convention. It should be compared with the simple statement of the American constitution that States shall lay no duties on imports or exports without the consent of Congress (U. S. Art. 1, sec. 10, subsec. 2). Space allows no discussion of the questions which have arisen under the free trade clause, such as, when exportation begins, or importation ends, the doctrine of the original package, the exercise of police powers by States, etc. Australia alone of all the colonies provided, as stated above, for uniform customs duties throughout the Commonwealth (Aust. 88) and further that no preference by law of commerce or revenue shall be given to any State or part of State (Aust. 99).⁹⁸

Besides the commission to report on the proper financial relations of the provinces and the Union, the South Africa Act establishes a Railway and Harbor Board consisting of three commissioners appointed by the governor-general in council, and of a minister of state as chairman. The commissioners hold office for a term of five years, are removable by the governor-general in council only for cause assigned, and receive a salary fixed by parliament. The Board, sub-

⁹⁷ See Indian Claim Case, 66 L. J. P. C. 11.

⁹⁸ Compare U. S. Const., Art. 1, Sec. 9, Subsec. 5, which provides against preference being given "to the ports of one State over those of another."

ject to the authority of the governor-general in council, shall have control and management of the railways, ports and harbors throughout the Union, which were formerly in control of the Customs Union, and shall administer them on business principles, but with due regard to the agricultural and industrial development of the Union and particularly of the inland portions of the provinces⁹⁹ by means of cheap transport. The reduction of rates may reduce the cost of materials and the rate of wages in the interior which would be advantageous to the mining industry. The business is to be managed so that the earnings shall not be more than are sufficient to meet necessary outlays and interest on the capital invested, which interest is to be paid into the consolidated revenue fund (S. A. 126, 127). A fund, however, may be put aside for the purpose of maintaining uniformity of rates, notwithstanding fluctuations in traffic (S. A. 128). In line with the development of new districts there is a provision for the construction of railways and harbor works, and the introduction of new services or facilities, and though they may at first be unremunerative, the loss entailed is to be paid out of the consolidated revenue fund (S. A. 130, 131). For assistance in the management of the finances and in accounting, provision is made for the appointment of a Controller and Auditor-General (S. A. 136).

The only similar commission provided for in the other constitutions is the Inter-State Commission in Australia. This Commission is composed of members appointed by the governor-general in council for seven years, unless sooner removed by request of parliament, and paid such salary as parliament may fix. It is clothed with

such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance * * * of the provisions of this Constitution relating to trade and commerce and of all laws thereunder.

It is also empowered to settle cases of undue discrimination of States against railroads and questions of rates on State railroads (Aust. 101-104). This was suggested by the American Interstate

⁹⁹ Natal fearing her railways and harbors might be used discriminately by the Union had "all provinces" inserted in Section 127.

Commerce Commission which was established by Congress many years prior to the Australia Act.¹⁰⁰

The Australian people realized the value of water rights when they inserted a clause in their constitution, securing to the States and the residents therein the reasonable use of the waters of rivers for conservation or irrigation (Aust. 100).

New Provinces and Native Affairs

Each constitution provides, in some manner, for the formation and addition of new provinces, States, or territories. Thus, with the consent of the affected province, new provinces or States may be created by the division of a province, or the union of provinces or, in Australia, of parts of provinces (S. A. 149, Aust. 124);¹⁰¹ and similarly the boundaries of a province may be altered (S. A. 149, Can. 3 (Act 1871), Aust. 123). The Union may also admit or take over, generally upon agreed terms and conditions, new States or provinces and territories and may provide for their government and representation (S. A. 151; Can. 146, 147 (2, 4, 6 Act of 1871); Aust. 121, 122).¹⁰² In South Africa and virtually in Canada the act of admission is a sovereign act, which may be altered by nothing short of Imperial legislation, while in Australia it is purely an act of the legislature, as it is in the United States. Thus in South Africa provision is made for admitting territories administered by the British South Africa Company, such as Rhodesia, and territories under the protectorate of the crown, such as the native territories. In its native protectorates South Africa presents a unique feature, for it has native territories not only on its borders, but also one wholly within the Union. The natives have never been conquered by arms, but they have come voluntarily under the protection of the crown. Indeed, so successful has the administration of the crown been, that the natives do not care to leave British control. Neither

¹⁰⁰ A good account of the origin of such commissions is given in Quick and Garran, *Const. of Aust. Com.*, p. 896 *et seq.*, where the origin is traced back to the "Board of Trade" of the Privy Council in England.

¹⁰¹ Compare U. S. Const., Art. 4, Sec. 3, Subsec. 1.

¹⁰² Compare U. S. Const., Art. 4, Sec. 3, Subsecs. 1, 2.

does South Africa desire to govern the protectorates, but it is contemplated that the trust will be handed over sooner or later inasmuch as the time will come when local supervision will be most expedient. The native population in these districts is about 600,000, while the natives in the four colonies number 2,500,000. There appears, therefore, no reason why such a small number of natives should not come under the control of the South African government. The responsibility of keeping peace with them will, it is pointed out, necessitate a wise and just policy of administration.¹⁰³ Still, the crown is in the position of a trustee for these areas and consequently dislikes to turn them over to South African control without stipulating that the broad principles underlying the present administration be continued, so that the natives may not experience an abrupt change of government upon sudden transfer to local control. Consequently, a schedule of twenty-five articles is appended to the constitution, providing for the government of these territories whenever they are transferred to the Union.

The character of the administration outlined in the schedule may be only briefly sketched here. The prime minister is charged with the administration in which he is advised by a commission of at least three members and a secretary appointed by the governor-general in council. They hold office for ten years with a fixed salary, may be reappointed for five-year terms and removed only by parliament. The duty of the commission is to advise the prime minister in all matters of administration and legislation in respect to the territories. The object of having a commission is to ensure that continuity of control which is necessary in dealing with natives and to raise their government above party politics of which they are apt to be made the playthings.¹⁰⁴ The prime minister is to lay all matters before the commission and obtain its opinion before coming to a decision on any question. In cases of urgent necessity, however, he may act without the delay of convening the commission, but he must notify each member and submit the reasons for his action. In case of disagreement between the prime minister and the commission, the

¹⁰³ "South Africa," Nov. 13, 1909, p. 583.

¹⁰⁴ "South Africa," July 24, 1909, p. 250.

matter is to be laid before the governor-general in council, whose decision in the matter shall be final.

The governor-general in council is to be the legislative authority, and through his proclamation only may laws for the peace, order and good government of the territories be made. Such laws shall be effectual unless and until parliament by resolution requests their repeal, or the King within a year disallows them. Thereupon the governor-general in council shall repeal the law by proclamation. He shall appoint a resident commissioner for each territory to assist in the administration and the finances. The salaries and expenses of the government, administration, and defence are to be paid by revenue derived from customs duties on articles imported and consumed in the territories. If this is insufficient, advances are to be made by the Union treasury, to be repaid in a year of surplus.

The natives are to be encouraged to continue their custom of holding pitsos or other forms of native assembly, and are to have free intercourse with the rest of South Africa, subject to the laws of the Union. In accordance with their own request their lands may not be alienated from the native tribes inhabiting the territories. No differential duties shall be levied on the produce of the territories, and no intoxicating liquor shall be sold to the natives. Their petition, however, that no legislation respecting them be made until their wishes in the matter were consulted, was not granted.¹⁰⁵ Their petitions show their desire to safeguard their rights under new rulers whom they do not trust as they do the Imperial government. It is stated by a man who has spent forty years in the service that the natives should be kept within their territories and encouraged by local self-government to work out their own salvation.¹⁰⁶ Their local assemblies have, as we have seen, been retained to them, but the convention took another view of their freedom and allowed them free intercourse with the rest of South Africa, subject to the laws.

The native affairs throughout the Union, together with any native reservations at the union vested in the colonies, aside from the native protectorates, are to be, roughly speaking, under the control and

¹⁰⁵ "South Africa," Dec. 5, 1908, p. 548.

¹⁰⁶ "South Africa," July 10, 1909, p. 117.

administration of the governor-general in council. He is to have all the special powers which the governors of the colonies exercised as "supreme chiefs" in respect to the native administration (S. A. 147). Thus native affairs are put in control of the Union and taken out of the hands of the provinces. In the government of natives Natal is conceded to outrank the other colonies. She has lived peacefully with the natives who are greatly in the majority and who were only some years ago savages. Many elements of her system of administration will probably be adopted by parliament. In fact, it is reported that Natal recommends the choice of a permanent secretary for native affairs outside of the ministry in order to ensure freedom from party control and continuity of policy, and further suggests the appointment of a council for native affairs.¹⁰⁷

Attention may perhaps here be directed to the other provisions in the South Africa Act relating to the natives. We have seen that the natives outside of the protectorates who have been naturalized in any of the colonies, shall be deemed naturalized throughout the Union (S. A. 138) and that the natives are in a way represented in the Senate by four members appointed especially for their knowledge of native affairs (S. A. 24). Concerning these provisions the discussion in and during the constitutional conventions was not so heated as concerning the clauses on franchise and eligibility to parliament (S. A. 26, 44). On the former clause Cape Colony early took a firm stand in favor of native franchise, while the other colonies took an equally firm stand for disfranchisement, while the English government stood aloof. Thus there arose two schools of thought, the one believing the natives should be given a fair opportunity, the other believing in their absolute repression. This attitude may perhaps be traced to the manner in which the question was settled in the grants of responsible government to the various colonies. In the interior colonies the natives were given no franchise, while in Cape Colony a limited franchise was allowed them. Consequently in the former colonies repressive laws followed, which greatly restricted the privileges of the natives, such as prohibition against riding in electric or railway cars, holding land, doing business, etc. Thus

¹⁰⁷ "South Africa," July 3, 1909, pp. 36, 41.

the courses adopted in dealing with the natives by the colonial governments became fundamentally different. While it was very desirable to have a uniform franchise, which meant either no color line in all of the colonies or native exclusion in all, neither course was feasible, because of the radically different policies of the colonies. The Cape supported the policy of equal rights to all civilized men, and she would have rejected a constitution which deprived her natives of their ballot. In the other colonies the policy was no equality between whites and blacks in either church or state, and they likewise would have rejected a constitution which imposed on them the native policy of the Cape. The provision retaining the native franchise in the Cape alone was therefore the only practical solution if union was desired at this time. The native franchise was not extended to Natal because her qualifications of voters were so strict that few natives enjoyed the franchise. Public men in South Africa believe the compromise is equitable, that a Union parliament will deal with the question on broad statesmanlike lines, and that the native will be given the ballot when he is prepared intelligently to use it. It is feared, however, by those who believe South Africa is to be a white man's country, that the native franchise in the Cape is not well safeguarded in the constitution, and that a radical parliament might dispense with the provision granting the franchise. It may be retained, however, by a vote of only fifty members, and the Cape has a representation of fifty-nine. Mr. Schreiner, an eminent lawyer of South Africa, championed the cause of native franchise and even went to London to lay the matter in the form of a petition from the natives before the Imperial parliament. In parliament the question was debated, but it being pointed out that the natives have practically the same franchise as they hitherto enjoyed, and that the colonies considered the question to be eminently a local problem, the parliament concluded the solution should be left to the Union which would reap the results of its own management.¹⁰⁸

¹⁰⁸ Similarly the Asiatic question is left to the Union instead of to the provinces (S. A. 147). In Natal the Asiatics are said to exceed the whites in numbers and consequently she has attempted repressive legislation. Files of "South Africa," October, 1908-June, 1909.

The clause which was considered the most reactionary and which called forth the most discussion was that restricting membership in parliament to British subjects of "European descent." This is an absolute bar to the native and perhaps to half-castes. Since her natives may sit in the provincial council and may vote the Cape disfavoured any such disqualification for the House, but the other colonies outnumbered her. In fact, the difference in view grew out of the differential franchise granted by England to the colonies, as we have seen, when they were given responsible government. The contest, however, was persistent and uncompromising, and Sir Henry de Villiers, president of the convention, is reported as saying that the cause of the Union would have failed if the Cape had not accepted the exclusion of blacks from parliament. In return for this the Cape was allowed to retain her native franchise. In the Imperial parliament the matter, it will be recalled, was hotly debated and attempts were made to amend the clause, but the conviction that such a course would wreck the Union led the parliament finally with unanimous regret to consent to the clause as it stood. The meaning of the phrase "European descent" also came in for its part of the criticism. The Under Secretary of State for Foreign Affairs believes the matter was intended to be left to judicial interpretation, but he believed it was synonymous with "white" and included Americans. But brilliant Indians who might sit in the Imperial parliament would appear to be excluded from the South African House, perhaps even if a strain of white blood coursed through his veins.¹⁰⁹

Foreign Relations

Since a constitution is a grant of powers, all powers not mentioned therein or necessarily implied from its provisions, are reserved to the grantor. Consequently the power to carry on official intercourse with foreign countries, unless bestowed on a colony, is retained by the crown. How far have the constitutions under discussion gone in this regard?

The treaty-making power being peculiarly a sovereign prerogative

¹⁰⁹ See Parliamentary Debates, *supra*, and Files of "South Africa," *supra*.

and an ear-mark of the independence of a country, could not consistently be granted absolutely to a dependent colony. Subject, however, to the approval of the English government, the South African colonies, especially the Transvaal, apparently were allowed to enter into certain agreements at least with neighboring countries, for it is provided in the constitution that "all rights and obligations under any conventions or agreements which are binding on any of the colonies shall devolve upon the Union at its establishment" (S. A. 148).

In the British North America Act the clause in regard to treaty obligations grants no power to enter into treaties, but confers on the parliament and government

all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries (Can. 132).

But it has been held that the Imperial Extradition Act of 1870 must govern in all matters relating to the extradition of fugitive criminals.¹¹⁰ Canada, however, since the various arbitrations between the United States and England have been decided in our favor, has taken a different stand in regard to treaties between the British Empire and another country which intimately affect herself. As a result of her protests England, before concluding such a treaty, submits it to Canada for her approval. This practice may, if it has not already, become general with all of the self-governing colonies instead of being limited, broadly speaking, as in the past, to commercial treaties. Moreover, in regard to the immigration difficulties with the Japanese in Canada, she sent a representative to Japan to settle the matter. And this was looked upon favorably by the English House of Commons, but it was admitted that it would have been out of the question a score of years back.¹¹¹ Furthermore, Sir Charles Fitzpatrick, Chief Justice of Canada, has been

¹¹⁰ *Ex parte Worms*, 22 L. C. Jur. 109, 2 Cart. 315, cited in Clements Can. Constitution, p. 345. See also Quick and Garran, Const. of Aust. Com., p. 635 *et seq.*

¹¹¹ Parliamentary Debates, 1909, Vol. 9, Column 1023.

chosen as a member of the tribunal in the North Atlantic Fisheries Arbitration at The Hague, between Great Britain and the United States, no doubt on account of his great familiarity with the case, but also it would seem because the question intimately concerns the Dominion of Canada.

In the Australia Act no mention is made of treaties, but the federal parliament is given power to make laws with respect to "external affairs" and "the relations of the Commonwealth with the Islands of the Pacific" (Aust. 51, xxix, xxx). The meaning of external affairs in this connection has been widely discussed by learned writers. It is admittedly a vague phrase, but its probable meaning has been summed up to cover "(1) the external representation of the Commonwealth by accredited agents where required; (2) the conduct of the business and promotion of the interests of the Commonwealth in outside countries, and (3) the extradition of fugitive offenders from outside countries." The phrase, however, is thought not to confer extraterritorial jurisdiction, because where that is intended in other subsections it is clearly expressed.¹¹² The same is believed to be true of the clause concerning the relations with the Islands of the Pacific. Beside granting authority to make certain representations to the Imperial parliament, this clause is thought to give power to enter into treaties with the Islands, which treaties shall not be subject to the same Imperial scrutiny as are those with sovereign countries.¹¹³

The Australian constitution contains further provisions of international import. Thus parliament may legislate in regard to "trade and commerce with other countries" and "fisheries in Australian waters beyond territorial limits" (Aust. 51, i, x). The latter is certainly intended to give some of the federal laws a remarkable extraterritorial operation. The clause, however, appears to be taken from the Federal Council of Australasia Act (48 and 49 Vict. c. 60, sec. 15 (c)) whereby that body was given a similar power

¹¹² Quick and Garran, *Const. of Aust. Com.*, p. 632. See the succeeding pages for a good summary of the growth of the practice of consulting the colonies in regard to the negotiation of commercial treaties.

¹¹³ Quick and Garran, *Const. of Aust. Com.*, p. 637.

of legislation. Moreover, acts were passed thereunder in 1888 and 1889 regulating pearl fisheries beyond the three-mile limit.¹¹⁴ These fisheries are pursued on the banks far out from the mainland and are similar to the pearl fisheries off the coast of Ceylon, which have been, on the ground of prescription, recognized by writers on international law as an exception to the three-mile limit of jurisdiction over territorial waters.

The Australia Act also stands alone in stipulating that the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth (Aust. Preamble 5).

Obviously this includes ships engaged in coastwise trade, but query whether the wording does not include vessels on more extended voyages, for example, from Australia to some Pacific Islands and return.

The subject of aliens has received some attention in all of the constitutions. Thus, the South Africa Act declares that all persons naturalized in the colonies shall be deemed naturalized throughout the Union (S. A. 139). From this clause the words "of European descent" were stricken out in the Bloemfontein convention, and thus the status of African and Oriental naturalized persons appears to have been preserved. In Canada and Australia no such requirement exists, but Munro points out that aliens naturalized before union in the Canadian provinces are recognized and may sit in parliament as senators.¹¹⁵ In these countries power to legislate on the subject of naturalization and aliens, and also, in Australia, on immigration, is given to parliament (Can. 91 (25), Aust. 51, xix). There is, however, the Naturalization Act of 1870 (33 and 34 Vict. c. 14) which in some respects is controlling in the colonies, and the colonial legislatures have adopted the main provisions of the act in accordance with authority given therein.¹¹⁶ The act enlarged the right of aliens to hold and alienate property, which previously was limited to personal property, so as to include real property. But it conferred no right to

¹¹⁴ Quick and Garran, *Const. of Aust. Com.*, pp. 570, 571.

¹¹⁵ Munro, *Const. of Can.*, p. 144.

¹¹⁶ Quick and Garran, *Const. of Aust. Com.*, p. 600.

hold property located outside the United Kingdom, while it further provided that local legislation conferring the privileges of naturalization shall have authority only within the limits of the colony. It would seem, therefore, that a person naturalized in Canada is not thereby a naturalized subject of the British Empire, and that his national status must be decided by Imperial law, while the rights and liabilities incident thereto must be, while he is in Canada, determined according to Canadian law.¹¹⁷ It appears, however, though the right to naturalize is given to the Dominion parliament, that it is still a question whether parliament or the provinces may legislate as to the incidents flowing from naturalization.¹¹⁸ In Australia the power to naturalize is not exclusively granted to parliament and it is there considered that naturalization under the State laws is good federal naturalization until parliament takes control of the matter.¹¹⁹

In case of war between England and another country, all of the colonies would legally become belligerent territory. Canada and Australia, however, claim that they should be left to decide when they should aid Great Britain in a foreign war. In the matter of Imperial defense, on which a conference of the Empire was held at London during the past summer, it is reported that England was in sympathy with the colonial feeling against a military Empire and for autonomy in military as in civil matters. All of the colonies represented, however, desired to take a fair share of the cost of naval defense. South Africa not being at that time a self-governing colony, was not officially represented at the conference, though some members of the Union delegation attended the meetings. But the Union, in assuming the liabilities of the South African colonies, becomes responsible for the naval contributions of Cape Colony and Natal, amounting to £85,000 per annum. The conference evolved a scheme for establishing an Imperial general staff with an interchange of officers trained in the Dominions, for making the training

¹¹⁷ *Donegani v. Donegani*, 3 Knapp, P. C. 63; *Re Adam*, 1 Moo. P. C. 460; Clements, *Can. Constitution* 230.

¹¹⁸ *Bryden's Case*, 68 L. J. P. C. 118; *Re Tomey Homma*, 72 L. J. P. C. 23; Clements, *Can. Constitution* 231 *et seq.*

¹¹⁹ Clark, *Aust. Const. Law*, p. 97.

and organization of over-sea troops uniform with those of the Imperial troops, and for establishing military training colleges in the Dominions. Moreover, during the summer the Colonial Defense Act of 1865, under which colonies could offer and England accept ships of war for the Imperial navy, was amended to allow also the offer and acceptance of seamen voluntarily raised by the colonies.¹²⁰

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¹²⁰ "South Africa," Aug. 14, 1909, p. 379; Aug. 28, 1909, p. 503; Aug. 21, 1909, p. 426; Sept. 4, 1909, p. 538.

COMPULSORY ARBITRATION AT THE SECOND HAGUE CONFERENCE.¹

It was in the natural course of things that the Second Conference of 1907, called to elaborate the work of 1899, should deal with the problem of extending arbitration along the lines indicated in the Russian proposal of 1899, and that the question should be reconsidered as to whether the nations could not and should not obligate themselves to refer disputes to arbitration.

In this connection it was possible to point to the fact that a large number of the most powerful and important signatory nations of 1899, as well as other nations not in the same class, had already taken steps in this direction in treaties concluded with various individual powers. The question was therefore asked whether it might not be possible to substitute a universal arbitration treaty instead of such a set of individual treaties, which must consist of $46 \times 45 = 2070$ conventions if it were to be complete, such universal treaty to embody a general obligation to submit to arbitration in a limited number of cases, but at the same time to form a nucleus for more comprehensive treaties to be concluded by the various individual nations. This question was propounded on all sides.

The United States of America made a proposition at the very beginning of the Conference, according to which the nations were to pledge themselves to refer to the Permanent Court of Arbitration of The Hague all differences of a legal nature or such as related to

¹ The above is a translation of an extract from an article on International arbitration, contributed to Herder's *Staatslexikon*, 3d edition, second volume, by Dr. Heinrich Lammasch, Professor of International Law in the University of Vienna.

It is not the custom of the JOURNAL to publish material which has appeared elsewhere, but as Dr. Lammasch is Umpire in the North Atlantic Coast Fisheries Arbitration between Great Britain and the United States, his views on arbitration are of peculiar interest. The JOURNAL therefore translates and publishes the article, which is as valuable as it is interesting. — J. B. S.

the interpretation of international treaties, provided they could not be settled by diplomacy and did not affect the vital interests, the independence, or the honor of either of the parties or the interests of third nations; however, the right was to be reserved by each party to decide itself whether its vital interests, independence, or honor were affected by the dispute. The propositions of Portugal and Sweden went further, for they added to this general but conditional obligation a limited but unconditional obligation to arbitrate certain disputes, while a proposition made by Servia contained only such a list of cases to be settled unconditionally by arbitration. A proposition made by Brazil constituted a variation of the American proposition, going further in some directions and being more restricted in others. The German Empire opposed all these propositions from the start. Although its first delegate, Baron von Marschall, could not express himself strongly enough to show the recognition of the principle of arbitration by Germany, both he and the second delegate, Privy Councillor Dr. Kriege, boldly and energetically opposed every definite proposition made in this direction. The general American proposition was objected to by Germany on the ground that it was useless and only a sham owing to the broad exceptions. To this it may be answered that the laying down of the principle in this form is not only of moral significance, as pointed out by the Austro-Hungarian delegate, von Merey, but has an extensive legal bearing. For even a qualified and conditional recognition of the obligation to submit to arbitration is a recognition of the fact that the arbitration of such disputes, after an unsuccessful attempt to settle them by diplomacy, is the normal method of settling them. If a nation does not wish to consent to arbitrate a question as proposed by the adversary in a given case, it must justify its refusal by invoking the vital interests or national honor clause. To be sure, this excuse does not need to be explained in detail, it being sufficient simply to advance it, but nevertheless the nations will generally hesitate to avail themselves of this pretext unless it is really warranted. Self-respect alone will restrain them from representing their honor as being too vulnerable or their vital interests as being too easily jeopardized.

Therefore, if a nation can not refuse to accept arbitration, when proposed by the other side, without invoking its honor or its vital interests, such refusal will not be so easy for it as without such a requirement. Such an obstacle to the refusal to submit to arbitration will certainly not operate to the detriment of international justice and peace. Moreover, the stipulation of article 16 of the convention of 1899 (now article 38 of the convention of 1907) is indeed contained in a treaty, but it has not the character of a treaty itself. It is nothing but the recognition of a theoretical idea or the advocacy of arbitration, but it implies no obligation to submit thereto. It is similar to the clauses of certain constitutions, which do not expressly lay down binding rules of law, but are merely intended as guides for future legislation and as such frequently remain unenforced for many years. However, this idea would have been converted by the Russian proposition of 1899 and the American proposition of 1907 into an actual treaty stipulation embodying a legal obligation, even although the latter were subject to very broad exceptions. This was perhaps just what certain nations did not want. Besides, the objection was made to this proposition that it did not limit the mission of arbitration with sufficient clearness, the distinction between questions of a legal nature and those of a political nature not being sharp enough, and that it did not even eliminate unimportant controversies for the settlement of which the procedure of arbitration is too cumbersome and expensive. The latter objection does not seem to apply, for arbitration will at all events only be resorted to in cases where a settlement by diplomacy has been unsuccessfully attempted. When this is the case, no other settlement except by arbitration will be possible unless the controversy is to be indefinitely prolonged so that, in spite of its original insignificance, it may assume a threatening character at some period of strained relations between the nations.

Even the second objection that a sharp distinction can not be drawn between questions of a legal and those of a political nature does not seem to be of decisive importance. The German Empire itself waived this objection in the treaties concluded by it with Great Britain and the United States of America, in both of which it in-

cluded this very clause. As a matter of fact, the exception of those cases in which the vital interests and honor are affected and the mention of the interpretation and application of treaties as being the principal field of application of arbitration would seem to define the idea of questions of a legal nature with sufficient accuracy. Furthermore, even in this connection it is left to the contending parties themselves to judge whether the controversy in question is a legal or political one. Finally, there would certainly have been no insurmountable objection in refraining entirely from mentioning questions of a legal nature in the text of the treaty and in confining the obligation to disputes regarding the interpretation and application of treaty stipulations. At the final vote thirty-five nations expressed themselves in favor of this American article (as partially amended by Sir Edward Fry), while five nations voted against it (Germany, Austria-Hungary, Turkey, Greece, and Roumania, Austria-Hungary having been more favorable to the proposition at first²), and four nations abstained from voting. The result of this vote was that, although the number of votes in favor of the article was seven times that of the votes against it, the article could not be included in the acts of the Conference, since a unanimous or at least almost unanimous agreement is necessary to adopt resolutions at international conferences.

Besides the American proposition, the conference was especially concerned with one made by Portugal, to the effect that the nations should obligate themselves unconditionally and without exception to arbitrate a small class of specifically defined disputes, such an obligation either being assumed in addition to the general obligation in accordance with the American proposition, which is broader, but subject to the exceptions indicated, or else in substitution therefor. The latter suggestion was made by Servia and the former by Portugal and Sweden, in connection with the treaties mentioned above and in accordance with a resolution adopted on motion of E. von Plener by the Inter-Parliamentary Union for Arbitration at its London conference held in 1906. At the beginning this proposition of Portugal

² See Von Mery's statement previously referred to in the text.

met with opposition on the part of Germany and Belgium as well as Great Britain and the United States of America. It did not even receive the hearty approval of France at first. However, in the course of a thorough discussion, Great Britain, the United States, and France fully indorsed the idea, so that there was finally a combined English-American-Portuguese proposition to adopt a list of cases unconditionally subject to arbitration. In form this proposition appeared as a supplement to the general but conditional obligation to submit to arbitration which it was desired in the American proposition to establish with respect to controversies of a legal nature. As a matter of fact, however, inasmuch as it was impossible to have this obligation accepted by all the Powers at the Conference, the English-American-Portuguese proposition came to be the only form in which the recognition of the principle of arbitration, with respect at least to certain controversies, could be expected. Baron von Marschall had at first held out the hope that perhaps the opposition of Germany to such an unconditional obligation with respect to a restricted number of cases might not be so insurmountable as her opposition to the general conditional proposition. Consequently all efforts of the friends of arbitration were now concentrated on this proposition, which was without doubt less significant in fact; for though it was evident to every one that this form of obligation could only extend to comparatively insignificant cases, nevertheless it now seemed to be the only form in which the principle of arbitration could be saved. This is the only way in which the obstinacy of the struggle for and against the list, so insignificant in itself, can be explained.

As the discussion proceeded, however, Baron von Marschall and Dr. Kriege used all their legal acumen in combating the list, for, to the regret of all, Professor Zorn, the German delegate, friendly to arbitration, was excluded from the labors of the commission. In the first place, the list was ridiculed owing to the small number and the insignificance of the cases enumerated therein. This did not occur at the Conference itself, to be sure, but in the discussions of publicists. It is certainly true, as said before, that of the eight subjects which the majority of the Conference thought

it possible to submit without exception to arbitration, probably only one is of great practical importance, viz., the subject of claims for damages of one nation against another, in regard to which arbitration should become compulsory when both parties admit the existence of the claim "in principle" and the only question remaining is the amount thereof and the mode of satisfying it. Under this condition a submission to a court of arbitration could certainly not impair the national sovereignty, while it would be likely to bring about a just settlement of the dispute. The other points on the list were of such minor importance that the votes approving them were given chiefly for the purpose of confirming the principle of compulsory arbitration. However, a number of fundamental objections were raised by Germany against these subjects as well as against every subject in regard to which it might be proposed to render arbitration compulsory by virtue of a general treaty. These objections, which were presented and defended with the greatest sagacity, had at least the merit of forcing the advocates of compulsory arbitration to examine the problem much more thoroughly. Whether they warranted the conclusions which were pretended to be drawn from them is of course another question.

In the first place, the fact was pointed out, that, according to the Portuguese-English propositions, even those disputes must be referred to arbitration which had already been passed upon by the courts of one of the contracting nations, and that conflicts might thereby arise between the national and this species of international jurisdiction. It was objected that a judgment rendered by the highest court of a country could neither be reversed nor revised by a court of arbitration: otherwise the jurisdiction of the nation in question might be impaired by the award and the principle might also be violated that no one can be denied the right to be tried by his regular judge. This objection applies exactly to the case in which the international court of arbitration is created solely for the purpose of deciding specific cases. Let us suppose that the publisher A has published a work of the foreign author B, contrary to the stipulations of a copyright convention existing between the nations in question. Suppose B has lost his suit before the courts of the

nation to which A belongs, because these courts, misinterpreting the international treaty, have assumed that there was no infringement of the copyright. Diplomatic representations on the part of the nation to which the author belongs fail to secure him his rights. This nation then induces the nation of which the publisher is a subject to refer the question of the interpretation of the copyright treaty, as well as the decision regarding the claim for damages, to a court of arbitration. In this case, if the court of arbitration decides against him, the publisher A will be deprived of the advantage which he had secured in a trial which was lawful in form if not just in substance. He can complain that an otherwise unassailable judgment has been set aside to his detriment, and that he has been denied the right to be tried by his regular judge, since the judicial organization of his country recognizes no international courts above the national ones. Therefore, it can not be denied that, in form, the authority of the national courts is impaired by an international court in such a legal proceeding, even although justice may have been accomplished thereby in substance.

However, the matter is quite different when the decision of the question as to which of two conflicting interpretations of a copyright treaty is correct is referred to a court of arbitration beforehand, not by an agreement concluded for the specific case in point, but by an international treaty applicable to all cases of this kind. Such a treaty declares in general terms that, in case of a disagreement between the two nations regarding the interpretation of such treaty stipulation, the decision of the legal point as to which meaning is to be assigned to the stipulation shall belong in the last resort not to the highest court of the nation of the defendant, but to a court of arbitration. By such an international treaty or such an arbitration clause the judicial organization of the contracting nations is overturned or supplemented with respect to such decision, inasmuch as the international court of arbitration is designated to take jurisdiction above the highest national court for the decision of this class of questions. For this very reason an arbitration treaty or clause of this kind requires, for its validity, the sanction of the authority having power to modify the judicial organiza-

tion under the constitution, which authority in most nations is the parliament. When this sanction is given, the rules regarding the jurisdiction of the national courts of the contracting nation are thereby supplemented. The highest court in the nation to which the defendant belongs can not then complain that a different tribunal has been arbitrarily placed above it, and the defendant himself can not complain that he has arbitrarily been deprived of the right to be tried by his regular judge. For both things have happened in pursuance of a provision of law which has been regularly enacted and which binds and restricts both courts and individuals. The situation is exactly the same in all other cases in which a certain category of disputes to be decided by the courts is referred once for all to an international court of arbitration by virtue of a general arbitration treaty. In all these cases a conflict between international and municipal law is as much precluded as it is inevitable when the decision of a specific case is referred to a court of arbitration.

A further objection related to the question as to what significance an arbitral award should have with regard to future administrative measures and the future judicature of the two nations concerned. As regards the administrative measures the answer is clear. According to article 37 of the convention for the peaceful settlement of disputes, the nations are obliged to execute the award in good faith. Therefore, if the award determines that the interpretation hitherto given to a treaty stipulation by the administrative authorities is incorrect, the national government shall be obliged to instruct its officials that they must henceforth adhere to the interpretation given by the court of arbitration. The matter is more difficult in the case of courts whose independence is recognized. In this case, if the courts do not voluntarily agree to the verdict of the court of arbitration, the government will either have to embody the interpretation of the latter in its legislation as an authentic one binding even on the courts, or else, if its courts render decisions subsequently which are not in conformity therewith, it will have to see that such decisions are rectified by a new court of arbitration. The latter course will always constitute a means of avoiding a conflict between treaty obligations and the administration of justice. A shorter method of

attaining the object would, assuredly, be that suggested at the Second Conference, viz., the embodiment in the arbitration treaty of a clause assigning to the award the force of an authentic interpretation of the treaty. If such a treaty receives the sanction prescribed by the constitution, it becomes an integral part of the law of the land and is binding even on the courts.

Another objection which occupied the Conference in this connection was that in regard to collective treaties, especially so-called "World treaties." The determination by a court of arbitration of the meaning of one of their stipulations involved in a controversy between two nations might lead to the dissolution of the "Union," created by such treaties, inasmuch as the other parties to such a world treaty might, in their relations with one another, construe such stipulation otherwise than the court of arbitration had construed it in the relations between the two contending parties, and even a subsequent award might construe the same point still differently between nations C and D than it had been construed between nations A and B. However, does it not happen in the internal administration of justice that two courts or even the same court in different judgments decide differently between different parties? This is chiefly owing to the circumstances that the facts are seldom exactly alike even in two apparently identical cases. To be sure, the cause may also lie solely in a difference of legal opinion. In a case where a dispute which has already been decided by a court of arbitration between nations A and B also arises between nations C and D, the first award will certainly have a great moral significance to the second court of arbitration, so that it will only be able to depart from the tenor of the first award in case it regards it as wholly unjustified. In this case, however, the second award may, by the force of its arguments, have the effect of renewing the controversy between nations A and B and of serving to rectify the original erroneous judgment (even international courts of arbitration are not infallible), thereby serving to bring about substantial justice. The committee of the Second Conference made a number of notable suggestions regarding this conflict of decision, but it is impossible to discuss them here.

Finally, the question was raised as to what should be done if the

award obliged one party to amend its laws and the parliament opposed the adoption of such an amendment. In answer to this it was pointed out that such obligation, which admittedly placed the parliament in an embarrassing situation, may also arise in other cases, as, for instance, when a treaty of peace is concluded or as a result of other international agreements which have been concluded without the coöperation of parliament. Austria gave an example of the faithful fulfillment of such a duty in 1902 when she repealed the law imposing an extra sugar tax, because the Brussels Sugar Commission had expressed the view, by a majority of votes at its first session, that this law was in conflict with the spirit of the Brussels Sugar Convention. This Sugar Convention of 1902 furnishes an instance to show that under certain circumstances a court of arbitration is authorized to decide whether or not the municipal legislation of a nation is in accord with the obligations assumed by it in treaties. Of course an attempt to organize a world market, as first made by that treaty with respect to a certain article, requires an international supervision and control, and it is likewise a matter of course that such a supervision can be intrusted with much greater confidence to a really impartial court of arbitration such as the Commission created by said treaty than to a group of interested parties.

It seemed inconsistent with the spirited and energetic opposition of the German delegates to compulsory arbitration for them repeatedly to advocate in the near future the creation of an international court of appeals for the purpose of taking final cognizance of disputes regarding international private law. It seemed likewise inconsistent for Germany as well as Great Britain to take the initiative in favor of establishing an international prize court; for the creation of such a prize court with power to pass upon the lawfulness or unlawfulness of the acts of naval officers in war times would certainly constitute a more radical impairment of the sovereignty of the contracting nations than the institution of an international court of arbitration for the purpose of construing a copyright convention or another convention relating to subjects of international private law.

In deliberations in both the large and small committees and lasting almost four months under the direction of Léon Bourgeois, who

had proven his capacity as a presiding officer at the First Conference, a number of the most prominent jurists of Europe and America examined the objections made. Endeavor was made, in a spirit of conciliation, to break the force of the objections by means of concessions rather than to refute them outright. Among the jurists may be mentioned: Frederic von Martens, the Nestor of conferences on international law; Asser, the most thorough expert in international private law; Sir Edward Fry, the master of the English common law; Fusinato and Hammarskjöld, the Italian and Swedish jurists who are equally prominent both from a theoretical and practical standpoint; the American jurist Choate, prominent both in diplomacy and in the courts; Mr. J. B. Scott, equally able as a professor and as a lawyer; Ruy Barbosa, the sagacious thinker and brilliant orator from Brazil; Drago, who has become celebrated through his acts as Minister of Foreign Affairs of Argentina; and above all, Louis Renault, aided by his skilful assistant Fromageot, won the admiration alike of friend and foe by his superior intelligence, experience, and forcible eloquence. As far as compatible with his instructions, the author of this article also endeavored to support all efforts looking to an agreement. At the last ballot 32 votes were given in favor of and 8 against the English-American-Portuguese proposition, which was ably and eloquently supported by the two Portuguese, Marquis Soveral and Mr. Oliveira, as well as by the Servian Milovanovitch. In this ballot those voting against the proposition were Germany, Austria-Hungary, Belgium, Bulgaria, Greece, Roumania, Switzerland and Turkey, three nations, Japan, Luxemburg, and Montenegro, refraining from voting. After the conciliatory propositions of Austria-Hungary (Merey) and Switzerland (Carlin and Max Huber) had been rejected, the conference agreed on a declaration drafted chiefly by Tornielli, viz.:

The conference has resolved to make the following declaration, in a spirit of conciliation and mutual concession, which is the spirit that has prevailed over the deliberations. This declaration, while preserving to each of the Powers represented the advantage of its vote, enables all to confirm the principles which they regard as being generally recognized. It agrees unanimously (1) in recognizing the principle of compulsory arbitration, and (2) in declaring that certain differences, and especially

THE LAW OF THE AIR-SHIP

The lawyers in every country have been kept busy during the last century in developing a special body of law, first for the railroad, then for the telegraph, and then for the telephone. They must soon address themselves to a new task of the same nature. The air-ship has at last been brought to a state of efficiency which, while far short of perfection, takes it out of the field of mere experiment and seems to assure its speedy employment in the transportation for hire of passengers and goods. Other uses of less worth to the community or of absolute detriment are equally certain. It will be seized as an aid in evil-doing by smugglers, spies, burglars; by criminals of all sorts flying from justice; and for illicit trade of every kind. It flies over the borders of one sovereignty into those of another as swiftly and irresponsibly as a bird. How far must it be the subject of public regulation? How fully can the precepts of private law which have been found applicable to other conditions and relations be applied to those resulting from the introduction of this new agency of power? Can there be one world-law for the high air, as there is one world-law for the high sea? Can such rules as those of general average and maritime lien be applied by analogy to aërial navigation?"¹

Is there, let us first ask, a right to navigate the air?

Justinian tells us that the air, like the high seas, is by natural right common to all.² In the sense that all can breathe it in as they have opportunity this is certainly true; but it can hardly be accepted as a proposition of jurisprudence with respect to its use for the support of a vehicle of transportation.

It has been abundantly settled by physiologists that the pectoral muscles of a human being are too weak to move anything in the

¹ See discussion of this point by Meyer, *Du Domaine aérien et de sa Réglementation juridique*. *Clunet's Journal*, 1909, p. 687.

² Inst. I, 1, *de rerum divisione*, § 1; Dig. I, 8, *de divisione rerum*, § 2, 1.

nature of wings in such fashion as to keep him afloat in the air. He must rely on the strength of some kind of mechanism, or on being buoyed up by something lighter than the atmosphere like balloons or balloonets, or on both. He is contending against the force of gravity; and the force of gravity never slumbers or tires. Every moment that he is being carried above the earth the structure that supports him is to some extent endangering the safety of all who are beneath it. Can it be said to be the natural right of any man thus to put in peril the lives and property of so many other men?

But if not a natural right, may it not be fairly regarded as one that can be acquired from the state?

Every independent nation must have the right to regulate the use of the air above its territory in such manner as best to promote the public interest.³ Its power extends to everything which man in the ordinary course of things can reach or appropriate on, or below, or above its soil. It is, in a sense, the ultimate owner of the soil and all upon it. It can tax it to any extent within the bounds of reason. It can reclaim any part of it for its own use on paying the owner just compensation, though it be taken against his will. In respect of the air-ship it will be dealing with a new means of making the air useful to its people. They will have an undoubted interest in having its utility promoted and its perils minimized. If it were to be granted, then, that no individual could navigate the air at will, it would not follow that the state could not give that privilege to whom it pleases, under such conditions as would further the public good. Every railroad is built and operated under a franchise from the state. Why? Because its construction and operation invade the tranquillity of individual land-owners, endanger the safety of person and property, and may obstruct public travel by other means (as at highway crossings). This franchise often grants the railroad company power to enter on the lands of private individuals, without seeking their consent, for the purpose of making preliminary surveys, and without making any compensation unless damage be act-

³ Grünwald would divide the air into a lower zone, in which there are rights of property, and a higher, where there are only spheres of influence. See *Journal de Droit Privé*, 1908, No. 7-9, 1058.

ually done. The public interest is deemed to justify this because otherwise the best route for the railroad could not well be known. In like manner it may justify the grant to the proprietors of an air-ship of the right to navigate the air under proper restrictions and for proper purposes.

Such a grant might take the shape of a bare license or of a franchise. Would not a franchise so obtained be a justification within the jurisdiction of the sovereignty from which it came, as against any adverse claim of private right? If to sail an air-ship would otherwise be either a public or a private nuisance, would not the franchise render it lawful and therefore no nuisance? ⁴ This would leave the owner of land under air in a position analogous to the owner of land under water. He may have an estate in fee simple, but it will be subject to a right of regulation, as to the use of the air, in the interest of the public, by public authority.

But has a land-owner such a right in the air above his property that, even were there no franchise for it, he could complain of legal injury from the use of it for an air-ship voyage?

In Coke on Littleton ⁵ we are told that the owner of land owns upwards the "Ayr, and all other things, even up to Heaven for, *cujus est solum, ejus est usque ad coelum*." This maxim was not derived from the nation whose language is used for its statement and, as we have seen, is foreign to the conceptions of the Roman law as to what is the common property of all. It is the production of some black-letter lawyer, and, like every short definition of a complex right, must be taken with limitations.

It would seem that one of these must be that a proprietor of land cannot be heard to complain of any use of the air above it by which no injury to him can result. In other words, the law will hardly aid him by giving a remedy in court where there has been and could have been no actual damage. His right, if any, is too tenuous for the state to care to protect by its active intervention.

Perhaps we may go farther and say that he has no legal right at all over the air above his land, except so far as its occupation by others could be of injury to his estate.

⁴ Baldwin's American Railroad Law, p. 28.

⁵ Page 4.

This seems to be a view quite in accordance with the spirit of our times. Modern government tends, at all points, to push the public good farther and farther into what was formerly thought the inviolable domain of private right.

The German Imperial Code of 1900 has expressed this tendency with particular relation to the subject under discussion. Two of its sections read thus:

904. The owner of a thing is not entitled to forbid the interference of another with the thing, if the interference is necessary for averting a present danger and the threatened damage is disproportionately great in comparison with the damage arising to the owner by the interference. The owner may require compensation for the damage arising to him.

905. The right of the owner of a piece of land extends to the space above the surface and to the substance of the earth beneath the surface. The owner may not, however, forbid interference which takes place at such a height or depth that he has no interest in its prevention.⁶

Another principle of Anglo-American law may be invoked, in determining the title of a landed proprietor to the protection of the state against invasion of what he claims to be his aerial rights.

The air-ship is a thing of passage. It flies in a second of time from a position over the soil of one man to a position above that of his neighbor. It carries to each and to all beneath it the same menace. It imperils the public generally.

Now an injury to the public is to be redressed by an action in behalf of the public. The offender is not to be vexed with separate actions by every member of it. One is enough to settle his liability and to settle it in favor of all those whom he has wronged. Only if special damage be suffered by some particular individual can he bring an individual suit for his own indemnification.

Should the air-ship drop a sand-bag in its course which strikes and wounds any individual, he would have at least a *prima facie* right to sue for damages whether he be or be not the owner of the land upon which he received the shock. The proprietor of the ship in whose service it was sailing and his servant, the master of the ship, would be equally liable. The Roman law would give such an action, whether

⁶ The new Swiss Civil Code, § 667, has substantially the same provisions.

the accident was or was not due to the immediate fault or negligence of the *aéronaut*.⁷ He has violated the cardinal rule *alterum non laedere*. Its principles in this respect are well summed up and rounded off in Art. 1383 of the *Code Napoléon*, in its provision that "*Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.*" The Supreme Court of the United States, however, has spoken of this as too rigid a rule,⁸ and more modern codes are couched in somewhat different terms. That of Japan (Art. 709) states it thus:

A person who intentionally or negligently violates another's right is bound to make compensation for damage arising therefrom.

The original project of the Imperial German Code excluded, in certain cases, damages that could not have been anticipated. As adopted, Art. 823 reads thus:

Wer vorsätzlich oder fahrlässig das Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht eines Anderen widerrechtlich verletzt, ist dem Anderen zum Ersatze des daraus entstehenden Schadens verpflichtet.

An interesting question of pleading under the common law system would arise in drawing a declaration against an *aéronaut* for dropping anything upon another. Should it allege the breach of duty to be the navigation of a vehicle of transportation of a kind which might naturally require the dropping of the thing in question for the safe prosecution of the voyage, or to be negligence in management? The former averment would present a simple case, if the proposition of law involved be sound: the latter it might be difficult or impossible to prove.

But for the public wrong, if wrong it be, of making such a voyage, or of dropping such a bag, it may at least plausibly be contended that the public only can complain, on the ground that no man who was not hit has any substantial interest calling for the intervention of the law, unless he were put in some special peril.

⁷ Inst. IV, 3, *de lege Aquilia*; 5, *de obligationibus quæ quasi ex delicto nascuntur*; Dig. IX, 3, *de his qui effuderint vel dejecerint*.

⁸ *Railroad Co. v. Lockwood*, 17 Wallace's Reports, 357, 383.

On the other hand, it may be argued that every man is in special peril over whose head an air-ship is passing. He is beneath the sword of Damocles, and the sword is not even supported by the horse-hair.

In one of Mr. Wright's flights, in 1909, in Germany, it is reported that he directed the course of his ship over the head of the emperor. A very slight accident might have involved a fall that would have changed the history of Europe. The emperor may have invited or encouraged such a manœuvre by his presence on the field whence the flight took place; but the ordinary citizen, engaged at home in his usual concerns, may now find himself in a similar position of danger should an air-ship chance to come in his vicinity.

The preventive processes of law, such as an injunction, seem in such a case to offer an inadequate remedy: the common processes of law, such as an action for damages, are still less efficient, for no damages except those incident to fear or apprehension could be proved, and those are shadowy, subjective, and uncertain.

But be this as it may, the air-ship voyager would certainly find some advantage, and if having proper skill and experience is probably entitled to some advantage, from a government license. He is pursuing an occupation which is potentially useful to the public in time of peace and will be highly useful to the public in time of war. He merits, therefore, some kind of public protection.

The natural conclusion would seem to be that the government can permit this new use of the air, under such restrictions as are required in the public interest, without invading the rights of land-owners, except in case of actual and substantial damage done.

Should an air-ship descend or the drag-rope of a balloon be let down in my garden, breaking through my trees or spoiling my crops, I should certainly, at common law, as by the *lex Aquilia* or *Edictum de dejectis*, etc.,⁹ have my action against any one in fault.¹⁰ Of this it would seem that no license or franchise granted by the public which he might hold could deprive me. Should the proprietor of a fleet of air-ships plying in a regular course of trade,

⁹ Dig. IX, 2, *ad legem A. Aquilian*, 27; 3.

¹⁰ *Guille v. Swan*, 19 Johnson's New York Reports, 381.

send them in a line of direction which would carry them over my house, and so low as to put me in serious and reasonable apprehension of danger, I might be able to get preventive relief. Should the government establish a certain defined roadway through the air above my land, to which all air-ships should be confined, and should the number of those traversing it become so great that my house was in daily and hourly peril, or was constantly invaded by smoke and soot, or rendered uninhabitable by bad smells, an injunction might perhaps be granted. But in each of these cases the complaint would be of a particular and special damage to a particular landowner.

Assuming then that the air-ship must be the subject of governmental authorization and regulation, what form should they take and from what source should they come?

In our country, for an air-ship voyage wholly within any particular State, the State would be the source: for all others, the United States, acting under their power to regulate "commerce with foreign nations and among the several States." The air-ship may be as fully an instrument of such commerce as a ship sailing the sea.

Much the same kind of regulations would be necessary both with regard to interstate and foreign voyages. Provision must be made for ship's papers; to fix the number of persons to be carried on a ship according to its capacity; for examining into the qualifications of those in charge; for the security, so far as may be, of the customs revenue; for the inspection of machinery; perhaps for pilotage.

A serious and fundamental question must, under any such system of regulation, be met by the courts. It is thus: Will the governmental license or franchise, even within the jurisdiction where it is granted, protect the owner of an air-ship if, while being managed with all due skill and care, it accidentally, by some force which can not be resisted, falls and injures person or property below?

There are judicial decisions which hold that one who pens up running water in a reservoir is liable to any one injured, if the dam yields and lets the water out in a sudden flood, with whatever care it may have been planned and constructed. He is likened to one who keeps a caged tiger in his house. The cage may have been built with what seemed due care; but if in fact the tiger breaks out,

whoever was responsible for confining him in such a place is responsible for whatever injury to others follows from his escape.¹¹

But a tiger is an enemy of the human race. It serves no useful end to make a household pet of him. The air-ship, promoting the public good, may well lay claim to a very different position. Yet the air-ship, like the reservoir, embodies a human attempt to control the natural operation of universal physical laws. If this be done not as a public enterprise, but for the profit of its owner, ought he not to be responsible at all events for what mischief it may do? And should he set up a franchise to navigate the air, in such a ship, could not, under our political system, a sufferer on the land from an accident occurring to it in the air, deny that this franchise could avail against the constitutional guaranty of the individual against deprivation of life, liberty, or property without due process of law?

The English law in regard to automobiles would seem to favor an opposite conclusion.

The owner of such a vehicle was using it in London with all due care and skill on a greasy and slippery road, when it skidded and ran on the sidewalk. A person with whom it there collided brought suit. The jury found that the vehicle, a motor omnibus, was liable on such a road to become uncontrollable, and did in fact become so, and that the defendant was negligent in sending it out for use there under such circumstances. On this verdict judgment was entered for the defendant, and, while it was reversed by the Divisional Court, the ruling was finally supported by the Court of Appeal (Lord Justice Buckley dissenting).¹²

If this be law, an English court could hardly impute negligence to an aviator who was navigating the air under a franchise so to do granted by the government, where the only negligence with which he could be charged lay in the bare use of the air as a means of support. Were he a foreigner, sailing under a foreign license, he would stand in a less favorable position, unless, by the aid of some form of international agreement or concerted legislation, his authority had received confirmation from the local sovereign.

¹¹ *Rylands v. Fletcher*, L. R. 3 H. of L. 330.

¹² *Wing v. London General Omnibus Co.*, Law Journal for July 24, 1909, Vol. XLIV, 460.

But even if a private action would lie against him for any damage arising from the events of his voyage, Anglo-American law would throw serious impediments in the plaintiff's way.

It is, to say the least, doubtful if an air-ship invades the rights of private landowners by simply flying over their property at such a height as to cause them no substantial inconvenience.¹³ If there be an actionable invasion, the common-law remedy is by a form of suit (trespass on the case) which can be brought wherever the defendant could be served with process.

But *prima facie*, certainly, when an air-ship descends to the earth, an actionable and direct wrong is committed against the owner of the land on which it comes to rest, unless his consent has been previously obtained. The remedy at common law was an action of trespass *quare clausum fregit*. It could be brought only in a court having jurisdiction over the land in question. The same rule generally obtains as to the modern form of action for such an invasion of another's rights. An aviator who lit upon a farm in Massachusetts could be sued only in Massachusetts, whether the proceeding were in the State or federal courts. Nor could his air-ship be seized on *in rem* process, issuing from either, under existing laws.

A statute enacted by a State authorizing a suit *in rem* in such case would justify the proceeding, if Congress had not acted in the matter. Congress might so act and, with regard to voyages from out of a State into a State, or *vice versa*, could give a remedy by attachment of the air-ship in the courts of the United States.

In the absence of some such statute, the remedy of the land-owner would often be illusory. The air-ship or balloon descends, comes in sudden contact with his house, or mutilates a shade tree on his lawn. It then regains the regions of the air by a new flight, or is hurriedly crated and carted away before he has an opportunity to procure a writ of attachment in an ordinary suit. The aviator is unknown to him, and, if known, would often be of no pecuniary responsibility. He may be a foreigner, against whom no action would lie in his own country. All these considerations call everywhere for remedial legislation.

¹³ Pickering v. Rudd, 4 Campbell's Reports, 219; 1 Starkie's Reports, 56.

Among the first questions to be met is one of the comity of nations. Shall a government license issued in one State or country be of any avail in another over which an air-ship may pass or into which it may descend?

That it should seems demanded in the United States (in the absence of federal legislation) by the principle of free trade between the States.¹⁴ From a broader point of view, it is required by the increasing solidarity of the world, proceeding from greater uniformity of political structure and a common standard of civilization; supported by so many international agreements and gatherings of an ecumenical character, and vivified by close and rapid commercial intercourse. Such a license might not and probably should not be accorded universal authority, but it certainly should, under a proper convention, be accepted as *prima facie* evidence that the voyage is a lawful one.

In securing such an effect for it nothing would be more helpful than the requirement by the government from which it emanates that its issue shall be conditioned on the filing of a proper indemnity bond for the benefit of whom it may concern. Such an obligation, with a sufficient surety, lodged in a public office, would afford an easy means of redress to foreigners as well as citizens of the country who might suffer damage by reason of occurrences incident to the voyage or voyages covered by the license. It would be of most service to the public were such a bond to hold for all voyages which the person licensed might take in the future in the ship which he was licensed to sail.

Another mode of attaining the same result would be to compel the owners of each air-ship to take out a blanket policy of accident insurance, covering all injuries occasioned by the use of the ship, and authorizing the parties injured to bring suit upon it in the name of the insured but for their own benefit.

¹⁴ Such a policy would be in accord with the general trend of our State legislation with respect to interstate automobile trips. The license from one State is commonly recognized in another as sufficient for a certain number of hours or days. Air-ship voyages will always be short.

It should also be provided by statute or treaty that air-ships should carry the flag of their nation, and each its own number, corresponding to that in its official registry. The project of an international code of aviation (*Règlement sur le Régime Juridique des Aérostats*), reported by M. Fauchille to the Institute of International Law in 1902, looks in this direction.

Might not treaties and statutes be also desirable prescribing a mode of indicating where a landing was permitted or prohibited? If, for instance, a red flag were made the sign of prohibition, it might fairly be provided that to land in the face of such a warning should subject the aviator to an action for double damages, enforceable by his arrest.

There have already been instances of shooting at balloons in mere wantonness. Such assaults would no doubt be cognizable by the courts of the country from which the fire-arms were discharged. Should they result in death to an aëronaut, no reason is perceived why that event should not be deemed to have occurred in the country over which he was floating.

For like reasons, should bombs be thrown from an air-ship with the purpose of wrecking property on land, the offense of throwing might by possibility be justiciable in one jurisdiction and that of damaging property in another.

In the Fauchille project, it was proposed (Art. 15) to make a prosecution for such offenses lie only in the country to which the air-ship might belong. This would secure unity of procedure at the expense of justice.

Another point demanding official treatment is the character of a homicide or personal injury caused by an aëronaut in the course of some manœuvre intended to save his own life. That he could not intentionally take another's life for that purpose is established.¹⁵ But may he not hazard taking it, though hoping to avoid such a consequence? If in taking such a voyage he is doing a lawful act, the law of self-preservation speaks loudly in his favor.¹⁶

¹⁵ *Regina v. Dudley*; (L. R.) 14 Q. B. D. 273.

¹⁶ See *Morris v. Platt*, 32 Conn. Reports, 75.

It is obvious that aviation (including in this term the use of the Zeppelin type of air-ship), if perfected, may be productive of great public benefits.

It helps to shorten the time and limit the expense of transit from one point to another. It offers a cheap and formidable engine of war both by sea and land. It serves to train men in presence of mind, in fortitude, courage, persistence.

It gratifies also the natural love for excitement and adventure. The North pole has been discovered. The center of Africa has become well known. What is left for ardent and ambitious spirits who would do something new and original, except to conquer the air?

They are fast conquering it.

Gasoline, a by-product of petroleum once thought valueless, and the electric spark, with their high power out of little weight, have made it possible, at least, for man to fly like a bird. But he can not descend as lightly. He must bear along with him an intricate and fragile apparatus which makes him a menace to the safety of whatever he passes over.

To harmonize the aëronaut's rights with those of other men and of foreign lands over which he may take his course, demands not only adequate local legislation but adequate international agreements. Professor Meili of Zürich, the author of *Das Luftschiff im internen Recht und Völkerrecht*, in a recent address before the *Internationale Vereinigung für vergleichende Rechtswissenschaft*, etc., of Berlin, has strongly advocated the convening, after due preparation and consultation, of an international conference for this purpose. It is certainly quite as much needed as that held in 1906 to regulate the international bearings of wireless telegraphy.

Such a body, to be of the greatest use, should devise more than one project of a treaty.

There are subjects involved on which all civilized nations could be expected to agree. There are also those on which they would be sure to differ. There are many regulations for times of peace which could be observed in all and consented to by all without serious difficulty. There are, on the contrary, few regulations for times of war

which would meet with universal favor. England would be apt to stand for one line of policy; France and Germany for another.

It is full time to make some attempt in this direction.

During the siege of Paris in 1870, a balloon went from there to Christiania, across the North sea, in fifteen hours. Count Zeppelin's dirigible air-ship can carry a full company of soldiers and formidable cannon. France has adopted the policy of collecting a duty of a hundred and twenty dollars on every balloon of average size coming down on her territory. The new project of a Swiss commercial code, published in 1903, declares that whoever wilfully endangers the prosecution of an air-ship voyage so as to put human life in peril shall be subject to imprisonment. Particular regulations of similar kinds will multiply fast, and each makes it more difficult to negotiate a common rule by treaty.

The holding of an official international congress to consider the law of the air-ship is rendered both more easy and more difficult by the unofficial international conferences of *aéronauts* of which several have already been held, and the next is to meet at Bordeaux in 1910. The organization constituted by these and known as the *Aéronautic Federation*, has shown that for such matters as the regulation of international aviation contests for prizes it is easy and practicable for those of different nations to take concerted action. Its composition, on the other hand, has been such as to make the promotion of the interests of *aéronauts* an object of more prominence than the protection of those of the public generally.

A public congress called to consider this particular subject alone can probably deal more intelligently with the question of the legitimate use of the air-ship in war, than one called, like the two Peace Conferences at the Hague, to consider many different subjects. It would also be less affected by sentimental considerations. The Hague Declaration of 1907, extended to the close of the next Peace Conference a prohibition of the discharge of projectiles and explosives from balloons or by other analogous methods. Though the Declaration was ratified by the United States in 1908, the other great powers stand aloof, and several of them voted against it when

adopted.¹⁷ While it was generally supported by those supposed to be especially the friends of peace, it may well be doubted whether peace is promoted by making war less horrible. Peace is to be striven for when consistent with honor; but when war comes the deadlier it is, the shorter it will be.

There are two lines from Locksley Hall, often quoted by those who have forgotten the thought that leads up to them, in which Tennyson's clear spirit of divination foretells horrors of the air that would make for a universal brotherhood of nations. Our days seem on the verge of giving reality to what, when he published it in 1842, seemed a visionary and fantastic forecast. Let me close by giving the whole passage:

Men, my brothers, men the workers, ever reaping something new,
That which they have done but earnest of the things that they shall do;
For I dipt into the future, far as human eye could see,
Saw the vision of the world, and all the wonder that would be:
Saw the heavens fill with commerce, argosies of magic sails,
Pilots of the purple twilight, dropping down with costly bales:
Heard the heavens fill with shouting, and there rained a ghastly dew
From the nations airy navies, grappling in the central blue:
Far along the world-wide whisper of the south-wind rushing warm,
With the standards of the peoples plunging thro' the thunder-storm:
Till the war drums throbbed no longer, and the battle-flags were furled
In the Parliament of Man, the Federation of the World.

SIMEON E. BALDWIN.

¹⁷ Scott, *The Hague Peace Conferences*, Vol. I, pp. 652, 653; Vol. II, p. 527, n.

THE BEGINNINGS OF AN AËRIAL LAW

During the year which has elapsed since the writer first devoted attention to some of the legal aspects of aërial navigation,¹ very material progress has been made in the art itself. Longer and more regularly controlled flights have been recorded by both the dirigible balloon and the aëroplane type of aircraft, between stated localities on land, over territorial waters and even over lanes of commercial importance upon the high seas. A great number and variety of aircraft are being built for state as well as private uses in large establishments erected in many countries for that particular purpose. The field of experiment and demonstration has constantly broadened. Great nations have established a special aëronautic service for use in conjunction with both the army and the navy. So great is the importance ascribed to the function of aircraft in the next great war that much attention is already directed toward the construction of special means for effectual defense. Indeed, an entirely new type of ordnance has resulted, having, as we shall see, a notable influence upon some questions of international law.

We have sought thus to define the conditions brought about by the scientific advance of the art during the period mentioned, because it is better to confine discussion of the legal problems to facts actually accomplished, or reasonably certain of accomplishment, rather than to deal with conditions vaguely conceived as the result of speculation or prophecy.

We recognize that not all scientists are convinced that the possibilities of aërial navigation are such as to promise a complete revolution in the means of transportation and communication, as was once effected by the steamboat and the railroad. The late Professor

¹ Aërial Navigation in its Relation to International Law. A paper read by the writer before the American Political Science Association at its session upon International Law, at Richmond, Virginia, December 31, 1908. Proceedings of the Association, 1908, p. 83.

Simon Newcomb, an eminent authority, though admitting the actual progress in air navigation, especially on the part of the dirigible balloon, maintained shortly before his demise "that the prospect of commercial success is still far in the future."² Basing his deductions upon the known laws of nature, he doubted whether the time would ever arise when passengers could be conducted through the air "in safety and comfort upon a machine that can be available at will;"² and insisted that at all events, between that time and the present, there must intervene "an epoch-making invention."

But though the degree of its usefulness may still be in doubt, all must admit that a new medium of internal as well as international intercourse and traffic has entered the life of man. Assuming but little advance over the present state of the art, air traffic in some of the forms already known to us will not be merely occasional, but frequent. As with all other advances in material science of a worldwide and permanent character, new relationships between states and individuals are imminent and to adjust and control them in an orderly manner is the task of government through law. "Society in most fully civilized nations," said the late Mr. James C. Carter, "is in a condition of incessant change, which means that customs are subject to incessant change and that the law resting upon custom must change in accordance with it. New arts, new industries, new discoveries are continually arising, involving changes in populations, employments and all other incidents of life."³

Recognizing the new conditions introduced by the latest accomplishment of science, especially in respect of intercourse between nations, the French Cabinet of Ministers resolved, on December 15, 1908, to invite the governments of the world to a conference to meet at Paris, to be devoted to the legal problems of aerial navigation. No date for the same was set and in fact nothing of a more definite nature has come to the knowledge of the writer. When the time is ripe for such a conference, it will undoubtedly be held. But even a conference composed of the ablest jurists can not readily

² "The Prospect of Aerial Navigation," in *North American Review*, 1908, p. 337.

³ James C. Carter, *Law, its Origin, Growth and Function*, (1907) p. 257.

produce results of value without long advance preparation, reflection, and discussion upon the practical problems involved.

It may not be generally known that the subject has received detailed attention from European jurists of distinction for nearly a decade past. As early as 1900, at an annual conference of the Institute of International Law held at Neuchâtel, Paul Fauchille, well known as the editor of the *Revue générale de droit international public*, proposed as a subject to constitute part of the order of the day for the next session: "*Le régime juridique des aérostats.*"⁴ This was accepted and, accordingly, at the following session, Fauchille presented to the Institute a detailed study of the subject, supplemented by a proposed legislative draft⁵ consisting of thirty-two paragraphs. Though the result of painstaking labor, it abounds in what would seem to be unnecessary detail and antedates practical conditions.

To Fauchille is probably due the honor of being the pioneer in this field of legal investigation. The subject has since received the more mature consideration which might be expected from longer familiarity with its practical problems. Such well-known jurists as Gareis, Grünwald, Hilty, Meili, Meurer, and Nys have devoted special attention to it and have developed the beginnings of a new field of jurisprudence.

If we except the limited number of problems involved in the discussions of the Hague Peace Conferences in respect to land warfare, there has been little attention devoted to the subject in this country. This is partly for the reason that the art has been practiced for the most part on European soil, even by American aeronauts, and also because the wide expanse of our home territory and its isolation longitudinally by two great oceans have postponed many of the international problems already become practical in Europe. But in view of the present nervous anxiety to advance the art on home soil and the unusual popular interest which air navigation in all its phases has aroused, at least an outline discussion of its legal aspects is timely.

⁴ *Annuaire* of the Institute, 1900, p. 262.

⁵ *Annuaire*, 1902, pp. 25-86.

We propose to discuss the subject under the following heads:

1. International Law, (A) In time of peace, (B) In time of war;
2. Municipal Law, (A) Private law, (B) Criminal law.

1. INTERNATIONAL LAW

(A) *In Time of Peace.*

Problems of an international character in respect of material portions of the universe begin with the period of occupancy. Barring the fancied flights of Icarus (which indeed left no impress upon the *jus gentium* of the ancients!) the air did not appear as a medium of travel until some three centuries ago. From that time to the present the means were so primitive and the accomplishments so insignificant that no questions arose except such as were quite independent of national rights in the airspace. The problem of the nature and extent of sovereignty in the airspace has now, for the first time, become practical, and it is therefore unincumbered with precedent.

It is not surprising that with the first enthusiasm over the arrival of a new art, the tendency should be in the direction of extending to it the greatest freedom and the most effective encouragement. Accordingly, as a result of the discussions of Fauchille and Nys, coupled with what was conceived to be the requirements of the art of wireless telegraphy, the Institute, at its Ghent session of 1906, adopted the following general principle:⁶

The air is free. States have only such rights over it in time of peace and in time of war as are necessary for their conservation.

Where precedent fails, analogy gives the clue and accordingly the great fluid of atmosphere surrounding the world has been likened to the high seas, with the sole difference that the sea of air abuts upon the sovereignty beneath in a vertical instead of horizontal direction. It is true that the reasons advanced by Grotius for denying all sovereignty over the sea apply equally to the airspace. All property, says he, is grounded upon occupation, which recognizes that movables

⁶ *Annuaire*, 1906, p. 305.

shall be seized and immovables enclosed.⁷ But this, a result of Roman ideas of private property, has been supplanted by the modern theory that the freedom of the seas is predicated on the impossibility of effective control by any state. Therein lies the difference, for the states are not thus impotent in respect of the abutting airspace. It is true that their control may not be complete, any more than it is upon the land, but as soon as the art has been regularly established, states will be able to execute their will upon the zone abutting them from above. As one writer has said, "the air is at all events not the sea, an aircraft no ship and a complete analogy is neither made *de lege lata* nor advisable *de lege ferenda*."⁸ Of course, all are agreed that over the free seas the air is likewise free. But the airspace over a given state stands in relation to it, to adopt the phrase of Holtzendorff, as a sort of appurtenance,⁹ or to follow the terminology of Grünwald, "a part of the underlying state."¹⁰ Even Fauchille would limit the principle of freedom by a right of self-protection (*droit de conservation*) in the underlying state, the scope of which is not exactly defined in his draft code.

The partisans of a second analogy compare the relation of a state to its airspace with that to its coast waters. This is certainly more in accord with the facts of the case and would result in recognizing sovereignty within a zone controllable by ordnance, subject to the rights of the craft of other states to pass inoffensively. The adoption of this analogy would affect the entire airspace available for navigation, as the new Krupp type of aéronautic cannon is said to have a range of fifty-five hundred, seventy-four hundred and even eleven thousand five hundred metres in a vertical direction.¹¹ The analogy and the rule resulting from it were strongly supported by Westlake before the Institute, but they were rejected in favor of a negative of sovereignty, saving the right of self-protection.

The reason that Westlake's proposal met with scant support was

⁷ *Mare liberum*, cap. 5.

⁸ Meurer, *Luftschiffartsrecht*, (1909) p. 5.

⁹ *Völkerrecht*, II, p. 230.

¹⁰ *Archiv für öffentliches Recht*, XXIV, p. 196.

¹¹ Meurer, *op. cit.*, p. 11.

because it appeared unfavorable to the free development of aerial intercourse between nations, yet, curiously enough, the exceptions predicated upon the main rule would probably result in much greater restrictions upon traffic than the recognition of sovereignty, tempered as it would be by every normal incentive to accord free passage.

The sweeping declaration of the Institute is out of accord with the conservative trend of international law and it was for this reason that the writer made use of still a third analogy (for the method of jurisprudence seems to require analogy where precedent fails). Before the American Political Science Association,¹² the writer suggested that the right of the craft of one nation freely to traverse the airspace of another might be compared with that of the vessels of one state freely to navigate the river of a coriparian state, especially when the river becomes navigable within its own territory. It is true that this has been asserted as a right in international law.¹³ Indeed the United States relied upon it as such in its demand freely to navigate the waters of the Mississippi to the Gulf, prior to the purchase of Louisiana.¹⁴ The doctrine now generally accepted, however, recognizes a right of absolute exclusion,¹⁵ though its exercise would be deemed harsh and, unless required by actual necessity, unjustifiable from the point of view of neighborly conduct and comity.

It is not advisable to adopt a broad statement in the conventional regulation of a new subject, as experience alone can demonstrate the real necessities of international intercourse. The proper practice was pursued at the Berlin International Radiotelegraphic Conference of 1906 which dealt with practical problems without attempting a declaration of principles. Laudable though it may be to encourage

¹² Proceedings, 1908, p. 87.

¹³ Bluntschli, *Völkerrecht*, § 314; Calvo, §§ 259, 290-291. Wheaton denominates it an imperfect right, only to be effectuated by convention. *International Law*, § 193 (8th ed.).

¹⁴ Moore, *Digest of International Law*, vol. 1, p. 623. Mr. Jefferson, while Secretary of State, asserted the claim upon "the law of nature and nations." *Ibid.* p. 624.

¹⁵ Phillimore, *International Law*, vol. I, p. 225; Hall, *International Law*, 5th ed., p. 140; Lawrence, *International Law*, § 112.

a new medium of intercourse, the very idea of sovereignty requires an extension above, as it does beneath, the soil of a state. The attempt of Holtzendorff, Fauchille and Rolland to restrict absolute sovereignty within a zone of isolation, varying from 330 metres (the altitude of the Eiffel Tower as the highest artificial object) to 1500 metres, would be impractical, both by reason of the topography of the earth, the effect of gravitation and the limitation of atmosphere available for human life. Furthermore, it would radically affect the very concept of national territorial sovereignty by recognizing horizontal as well as vertical boundary planes.

Lorimer has pointed out that national sovereignties as developed in the modern world are interdependent as well as independent.¹⁶ Nowhere is this so apparent as in respect of the means of intercommunication and traffic. Self-interest alone will impel each state to grant access to and passage through its airspace in time of peace, subject only to such rules as its reasonable interests require. When the time is ripe, the enlightened policy of the family of nations may be relied upon to establish such rules of intercourse as will promote rather than impede aerial traffic. As proof it is but necessary to refer again to the convention adopted as a result of the Berlin Conference of 1906, relating to wireless telegraphy, to which the United States is also a party. By Article 3, for example, a duty is imposed on all coast and shipboard stations to reciprocally exchange wireless messages irrespective of the system employed.¹⁷ It is not unlikely that a convention will in time be worked out similarly between the nations, insuring necessary regulation in the interest of aerial intercourse. Such an agreement would properly apply to the rights and privileges of foreign craft, especially of a public character, to make use of the local areas and establishments set apart for alighting, mooring and embarkation; also to rights of way, lateral and vertical, means of identification and signals.¹⁸

As with international communication through wireless telegraphy,

¹⁶ Institutes of the Law of Nations, vol. 1, p. 364.

¹⁷ American Journal of International Law, Official Documents, vol. 3, No. 4, pp. 331, 332.

¹⁸ Meurer, *op. cit.*, p. 21; Fauchille's Code, *Annuaire*, 1903, p. 19.

so with air navigation, the main problems in time of peace are administrative rather than fundamental. The endeavor to work out a limitation of sovereignty impedes, rather than promotes, the cause of free navigation in times of peace, and, as we shall see, will tend toward undesirable results in time of war.¹⁹

(B) *In Time of War.*

Long before the present period of progress in aërial navigation, balloons were employed in the actual conduct of warfare. Their use, however, has thus far been restricted to reconnaissance and escape from siege. During the Franco-Prussian War, the French made extensive use of them in attempts to discover the formation of the German lines. Gambetta's dramatic escape from Paris to the provinces may also be recalled. Referring to the capture of a French balloon manned by a British subject, Bismarck said that his arrest and trial by court-martial as a spy "would have been justified, because he had spied out and crossed our outposts in a manner which was beyond the control of the outposts, possibly with a view to make use of the information thus gained, to our prejudice."²⁰ In fact, one condemnation is on record, though the death sentence was finally commuted.²⁰

The attitude of the Prussians in thus impressing a character of espionage upon all belligerent aircraft has been much criticized by writers upon international law, among others, even German authorities such as Zorn.²¹ Hall maintains that "neither secrecy, nor disguise, nor pretence" is possible for persons traveling in aircraft.²⁰ In the codification of the practices of land warfare, the Hague Peace Conferences of both 1899 and 1907 adopted, in identical terms, a general negative definition of the class of persons subject to the

¹⁹ In the debate before the Institute, the French authority Weiss defended the view adopted in the text by the writer (once his humble pupil) with the following trenchant remark: "La théorie de l'air libre conduirait à des notions imprécises et à des discussions sans fin. Il faut se limiter aux questions pratiques." *Annuaire*, XXI, p. 304. Von Bar reached a similar conclusion: "Il est trop tôt pour formuler un principe sur la condition générale de l'air." *Ibid.*, p. 301.

²⁰ Hall, *International Law*, p. 540.

²¹ Zorn, *Kriegerecht zu Lande in seiner neuesten Gestaltung*, p. 186.

charge of espionage. According to the convention finally adopted, it is declared that to the class not subject to such a charge "belong likewise persons sent in balloons for the purpose of transmitting dispatches and, generally, for maintaining communications between different parts of an army or territory."²² Accordingly, aëronauts are not exempt under every circumstance, but only when acting as emissaries. The language does not cover reconnaissance, though when aëronauts are thus occupied there is some ground for asserting exemption by reason of the general clause of Article 29 which provides:

A person can only be considered a spy when, *acting clandestinely, or on false pretences*, he obtains, or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

It is obvious that the scope of the exclusion contained in the definition is broader than the example. If it be true that neither secrecy nor pretence is possible for persons who travel in balloons, the exemption under the convention is absolute. We are not prepared to admit, however, that the use of aircraft can not be clandestine in nature, or false in pretence, merely because aircraft are normally visible over a wider area than are other means of communication. It is desirable that military aircraft receive "a fixed distinctive emblem recognizable at a distance," so as to make the whole of the convention applicable to them under Article 1, Section 2. The display of such an emblem would exempt aëronauts from the charge of espionage under all circumstances; in its absence, however, except when acting as emissaries, it is doubtful whether the convention furnishes such protection. The surrounding circumstances of each case must decide.²³

While the actual use of aircraft in warfare has thus far been restricted to the transportation of envoys and scouts, the past decade has witnessed their development for offence. It would be difficult to

²² Regulations annexed to the Convention concerning the laws and customs of war on land, Art. 29.

²³ So Zorn, *op. cit.*, pp. 185-187. He deplores the unsatisfactory condition in which this matter has been left by the Convention. *Ibid.*, p. 179.

establish just when the General Staff of any government first made plans for launching projectiles or explosives from the airspace. That such plans were known to the Russian Government in 1899 is a conclusion warranted by the definite language employed by Count Mouravieff in his circular letter of January 11th of that year, to the representatives of the Powers, proposing a program for the First Peace Conference. Of the eight proposals which it contained, the third read as follows:

To prohibit the use in military warfare of the formidable explosives already existing and to prohibit the throwing of projectiles or explosives of any kind from balloons, or by any similar means.

The attitude of the delegates at The Hague in 1899 showed that though plans may have existed, no great progress had been made for the offensive use of aircraft. The general spirit of humanitarianism which dominated the Conference induced it to agree to prohibit a means of warfare suspected to be capable of great destructivity, but still so undeveloped

that the persons or objects injured by throwing explosives from them may be entirely disconnected from any conflict which may be in process, and such that their injury or destruction would be of no practical advantage to the party making use of the machine.²⁴

It was indeed on motion of the American Military Delegate, Captain Crozier, that the full committee added a time-limit of five years for the prohibition, after the sub-committee had voted that it be perpetual. It was this, perhaps, that saved the rejection of the proposal in its entirety. At all events, it was passed in this form by the Conference and ratified by all of the participating nations except Great Britain, Italy, Japan and Luxemburg.²⁵

The declaration having meanwhile expired by limitation, the Belgian delegation moved at the Conference of 1907, to renew the prohibition in exactly the same terms. Two amendments were made in sub-committee to apply in the event of failure of the main pro-

²⁴ Report of Captain Crozier to the Commission of the United States to The Hague Conference. Holls, *The Peace Conference at The Hague*, p. 95.

²⁵ See table of adherences, Scott, *The Hague Peace Conferences*, Vol. II, p. 161.

posal, one by Russia to forever limit attacks by aircraft upon undefended places, the other by Italy, that no projectiles or explosives should be launched from balloons not dirigible and manned by a military force, and that the restrictions resting upon land and naval warfare should apply to aerial warfare "wherever compatible with this new method of combat."²⁶ The original proposal was, however, again adopted by the Conference with a feature suggested by Great Britain, that the prohibition is to extend to the close of the Third Peace Conference.

The convention has been ratified by twenty-seven nations. It failed of ratification by seventeen, among others by France, Germany, Italy, Japan, Mexico and Russia.²⁷ To explain the change of attitude on the part of France, Germany and Russia against the prohibition and of Great Britain in its favor is not an easy matter. It has been objected that the prohibition is not reciprocal as it subjects aircraft to attack while depriving them of their proper defense.²⁸ Another reason entirely logical in itself is that the advance in the art since 1899 in respect of dirigibility has now brought it outside the motive originally in the minds of the American delegates, which was to prevent the use of uncontrollable forces dangerous to neutrals or noncombatants. If such be the true reasons, we have nevertheless a distinct retrogression from the humanitarian viewpoint which, through the Conferences, sought to restrict the means of warfare to those heretofore employed.²⁹ Reluctant as we may be in arriving at such a conclusion, the change of front can be satisfactorily explained only by the change in the technical position of the respective Powers in their land and naval forces and the relative advance that each has made in aeronautics. A superior naval power may well find its advantage largely reduced, if not entirely overcome, in a contest with a nation of well-built and skilfully manned

²⁶ *Deuxième Conférence int. de la Paix. Actes et Documents*, I, p. 104.

²⁷ See table of adherences, Scott, *op. cit.*, Vol. II, p. 531.

²⁸ H. W. L. Moederbeck, *Die Luftschiffart*, p. 103; G. O. Squier, Major, U. S. Signal Corps, *The Present Status of Military Aeronautics*, § 201.

²⁹ See second proposal of Count Mauravieff in his letter of Jan. 11, 1899; also remarks of Col. Gilinsky before the first commission, *Conférence int. de la Paix*, 1899, part II, p. 49.

aircraft. The military isolation of Great Britain can no longer be assumed since it has been demonstrated that even heavier-than-air machines in their present admittedly imperfect stage can cross the English Channel. English writers of considerable conservatism and not inclined toward phantasmagoria, admit the "aërial peril."⁸⁰ It is certainly significant that from a position adverse to the prohibition, Great Britain has now changed to one of loyal support.⁸¹ Russia's change of attitude may be accounted for by the loss of her navy since the First Hague Conference. That Germany refrained from ratifying the Declaration seems clearly the result of her progress in the use of dirigible craft and of the great expenditure of money made on this account. Germany has developed not only the defensive weapon for use against aircraft which has already been mentioned, but a special aërial artillery for offensive use as well.⁸²

Though the main prohibition has thus failed of endorsement by many Powers, it is noteworthy that the Russian amendment to render unfortified places immune from attack has been given effect in much broader form than expected. The committee of the Second Conference having in hand the revision of the Convention of 1899 regulating the laws and customs of land warfare, amended Article 25 of that Convention by the insertion of a phrase having for its object the protection of undefended places from aërial attack. The article as adopted by the Conference and afterwards ratified by all the great Powers now reads (amendment in italics):

The attack or bombardment, *by any means whatsoever*, of towns, villages, dwellings, or buildings, which are undefended, is prohibited.

Even without the amending phrase, the article would seem to have been sufficiently broad. The opinion prevailed that as the Con-

⁸⁰ T. G. Tulloch, "The Aërial Peril," *Nineteenth Century*, May, 1909.

⁸¹ German writers unhesitatingly ascribe this as the cause. Meurer, *op. cit.*, p. 38. Hilty broadly declares that the original proposal was made purposely for the protection of London; in a note he adds: "Written 1903; confirmed February, 1904, in respect of all island nations; these have heretofore enjoyed a privileged situation." He entirely overlooks that Great Britain never ratified the Convention of 1899. See also *Archiv für öffentliches Recht*, Vol. XIX, p. 81.

⁸² Dienstbach and McMechen, "The Aërial Battleship," in *McClure's Magazine*, August, 1909.

vention was applicable to *land* warfare, the question might arise as to its applicability to aërial warfare. Curiously enough, the Convention respecting bombardments by naval forces, adopted for the first time by the Second Conference, omits these words in its corresponding Article 1. This is probably an oversight due to the fact that the latter Convention was the work of a different committee. It is fair to assume that the prohibition is ample to cover aërial craft constituting an auxiliary to *naval* as well as land forces. This seems to have been the assumption of the American delegation at least, for, in its official report, it is said (under IX): “* * * the Convention brings the rules of land and naval warfare into exact harmony” (*i. e.*, in respect of bombardments of undefended places).

Attention is called to Article 53 of the Convention upon land warfare as revised by the Second Conference, in which, for the first time, the three means of warfare, land, naval and aërial, are jointly referred to in a treaty. By virtue of this article, aircraft though owned by private persons are specifically made liable to seizure by an army of occupation, subject to the right of the owner to obtain restoration and compensation after the establishment of peace.

One of the most striking problems introduced by the prospect of aërial warfare is that of properly defining neutral obligations in the airspace.³³ Manifestly, the principle of the freedom of the air pronounced by the Institute of International Law would lead us into grave difficulty upon this question, for the airspace, even over neutral territory, would be as much a field for war operations as the high seas. Considering the inevitable operation of the law of gravity alone, the statement of such a proposition is its own refutation and demonstrates that general principles are dangerous, if not in themselves, yet in the consequences to which they may lead when carried to their logical conclusions. Of course, the airspace above belligerent territory may be closed to neutral craft.³⁴ But how far neutral

³³ “The slaughter of our kind proceeds by land and sea and the Conference opened up a new element, the air, so that the bowels of the earth — unless infected by mines — are the only refuge of peace.” J. B. Scott, *The Hague Peace Conferences*, Vol. I, p. 654.

³⁴ Meurer, *op. cit.*, p. 39.

states shall be obligated to exclude all belligerent craft from their abutting airspace is a question somewhat premature for useful discussion. In view of the attention devoted at the Second Hague Conference to the duties of neutrals in respect of radiotelegraphic communication,³⁵ it is not improbable that a more detailed regulation of the airspace broad enough to cover the practical problems of aerial warfare will constitute part of the program for the Third Conference.³⁶

In concluding this branch of our topic, notice must be taken of the contraband nature of aircraft and the accessories to the same. At the recent International Naval Conference held in London, a clause was inserted in the Declaration concerning the laws of naval warfare, which, among other things, declares that the following articles susceptible of use in war as well as for the purposes of peace may, without notice, be treated as contraband of war, under the name of conditional contraband: * * *

Balloons and flying machines and their distinctive component parts, together with accessories and articles recognizable as intended for use in connection with balloons and flying machines.³⁷

2. MUNICIPAL LAW

(A) *Private Law.*

Blackstone in his Commentaries³⁸ says:

Land hath also, in its legal signification, an indefinite extent upwards as well as downwards. *Cujus est solum ejus est usque ad coelum* is the maxim of the law; upwards, therefore no man may erect any building or the like to overhang another's land. * * * So that the word "land" includes not only the face of the earth but everything under it, or over it.

³⁵ See Convention respecting the rights and duties of neutral powers and persons in case of war on land. Articles 3, 8, 9.

³⁶ Meurer proposes that the Conference consider the advisability of excluding neutral air craft only from so much of belligerent air space as constitutes the actual field of operations. *Op. cit.*, p. 40.

³⁷ Article 24 (8). Correspondence and documents respecting the International Naval Conference held in London, December, 1908-February, 1909, p. 79 (official publication of the British Government).

³⁸ Cooley's Blackstone, 4th ed., Book II, p. 18.*

The advent of aërial navigation gives a new significance to the Latin maxim quoted in the foregoing passage and awakens interest in its origin and scope. Blackstone's authority is Coke upon Littleton wherein the following is found:³⁹

And lastly, the earth hath in law a great extent upwards, not only of water, as hath been said, but of air and all other things even up to the heaven; for *cujus est solum ejus est usque ad coelum*.

Reference is then made by way of specific authority to some of the ancient law books. In default of access to these, the writer has endeavored to trace the maxim to the *Corpus juris* but without success so far as concerns its exact phraseology. It would seem rather to be the work of some gloss upon a passage in the Digest⁴⁰ justifying the removal of projections from adjoining property over a place of burial, because to the sepulchre belongs not alone the ground enclosing the remains, but everything even up to the heavens: *quia sepulchri sit non solum is locum, qui recipiat humationem, sed omne etiam supra id coelum*.

It will be observed that the sources of the maxim, both in the common and the civil law, do not indicate a right of property in the air or airspace as such, even if this were conceivable. The principle is, by reasonable interpretation, one for the better enjoyment of the land and refers to the airspace so far as it is *appurtenant* to the land. The usual remedy under the common law for interference with the possession of land was, of course, the action of trespass *quare clausum fregit*, and yet it is curious to note that even as late as the early part of the last century, there was considerable doubt as to whether trespass would lie, where there was no tangible interference with the land, but only with the airspace.

Thus in *Pickering v. Rudd*,⁴¹ a board connected with the land of defendant projected over the land of the plaintiff. Lord Ellenborough was of the opinion that it was not trespass "to interfere with the column of air superincumbent upon the close." He doubted

³⁹ Thomas' ed. (Philadelphia, 1836), Book II, ch. I.

⁴⁰ Digest, 42, tit. 24, pr. 22, § 4.

⁴¹ (1815) 4 Camp. 219.

not, that if one shot off a gun so that the bullet would fall into the field of one's neighbor, it would assuredly be a trespass, but the learned Justice continued as follows:

But I am by no means prepared to say that firing across a field *in vacuo*, no part of the contents touching it, amounts to a *clausum fregit*. Nay, if this board overhanging the plaintiff's garden be a trespass, it would follow that an *aéronaut* is liable to an action of trespass *quære clausum fregit* at the suit of the occupier of every field over which his balloon passes in the course of his voyage.

The last sentence is truly remarkable in view of present developments. The comparison may have been suggested (though it is only a surmise) by the fact that at the moment, the British armies were waging the Waterloo campaign. This brought them upon the field of Fleurus where Napoleon, some years prior, had gained a notable victory against the Austrians by means of information obtained through the use of balloons. Half a century later, Lord Blackburn, in referring to the doubt expressed by Lord Ellenborough, said: "I understand the good sense of that doubt though not the legal reason of it."⁴² It is plain that at least in the mind of Lord Ellenborough, the reason was that there was no interference with the possession of the *land*; whether we agree with that conclusion is another matter. The opinion expressly states that if the plaintiff can show damage, he may recover in an action upon the case. Later decisions in England and in this country found no difficulty in justifying the action of trespass in all cases of encroaching signs, buildings, trees, overhanging telegraph and telephone wires and the like where the attachment to the soil was upon defendant's land, though entirely clear of the complainant's. Such interference constitutes not only a trespass, but also a nuisance under the laws of some of our States.⁴³ But this is wholly independent of any recognition of property rights in the airspace. In *Corbett v. Hill*,⁴⁴ the plaintiff owned a building wherein part of a room, by vested rights, protruded over the land of

⁴² (1865) *Kenyon v. Hart*, 34 L. J. M. C. 87.

⁴³ *Meyer v. Metzler*, (1875) 51 Cal. 142; *Electric Improvement Co. v. San Francisco*, (1891) 45 Fed. 593.

⁴⁴ (1870) L. R. 9 Eq. 671.

defendant. Defendant had sought to build upon his property so that the building would protrude over the projecting part of the plaintiff's building. It was held that trespass could not be sustained for the encroachment upon the column of air over this part of the building, because the rights in the column of air were in the defendant as owner of the soil beneath, and not in the plaintiff. It is a reasonable conclusion that the court recognized that rights in the airspace must be strictly appurtenant to the soil beneath.

In the present period wherein the old strictness in respect of the forms of action is largely disregarded, it is difficult to determine whether or not the cases most nearly analogous apply to the problem now in hand. Thus in *Clifton v. Bury*,⁴⁵ the plaintiff complained of damage to his land by reason of the shooting over it done from the Wimbledon rifle ranges close by. Though the bullets sped clear across one of his farms situated in a declivity about seventy-five feet below the range, the court found for the plaintiff. It has been said⁴⁶ that this case impliedly overrules the *dictum* of Lord Ellenborough in *Pickering v. Rudd*, but a careful reading of the opinion of Sir Henry Hawkins will show that the gravamen of the action was the actual interference with the enjoyment of the soil:⁴⁷

certainly it will cause no unreasonable alarm which renders the occupation of that part of the farm less enjoyable than the plaintiff is entitled to have it.⁴⁸

If the view favored by the writer be adopted, then the *dictum* of Lord Ellenborough is quite maintainable, though it may have led him to a wrong conclusion in the particular case. Each case must rest upon its own circumstances and special facts. If the passage

⁴⁵ (1887) 4 T. L. R. 8.

⁴⁶ *Engineering*. June, 1909, p. 793; L. Fox, "The Law of Aërial Navigation," in *North American Review*, July, 1909, p. 101.

⁴⁷ Reference is here made only to so much of the case as refers to the shooting of bullets *in vacuo*. Plaintiff in fact also proved that shots fired across another of his farms actually fell upon the land.

⁴⁸ (1887) 4 T. L. R. 8, at page 9. As to this farm, "his Lordship did not look upon the ground of complaint as constituting a trespass in the strict technical sense of the term; but he did look upon such firing of bullets as grievances, which, under the circumstances, afforded the plaintiff a legal cause of action." *Ibid.*

of aircraft over a piece of land really interferes with its actual enjoyment, the courts are able to grant a remedy for the wrong in fact. The mere passage through the airspace above the land should not in itself constitute the wrong. It is in this light that we interpret the language of Sir Frederick Pollock:⁴⁹

Clearly it would be a trespass to sail over another man's land in a balloon (much more in a controllable airship) at a level within the height of ordinary buildings and it might be a nuisance to keep a balloon hovering over the land at even a greater height.

Sir Frederick is equally of the opinion that a trespass is not constituted by passage through the airspace at the great height reached by modern projectiles. He seems inclined to believe "that the scope of possible trespass is limited by that of effective possession," though unfortunately does not further pursue the thought. Doubtless we may refer it to the essential requirement of trespass *quære clausum fregit* that there should be possession, or the right to possession, in the complaint. The suggestion is novel inasmuch as it regards this requirement as objective as well as subjective. But though this phraseology has already gained currency, it is more specious than precise, because the scope of effective possession as far as it concerns the airspace is indeterminate and will vary with the advance in the art of air navigation. Furthermore it leaves open the airspace for the acquisition of rights not necessarily appurtenant to the right of enjoyment of the soil. Such a result would be inconsistent with and harmful to the state of society among free peoples and is not warranted by the principles of either the common or the civil law.

The maxim of the law already referred to should not be extended to conditions which did not exist and were not conceived of at the time of its origin. Its phraseology, *usque ad coelum*, has been referred to by an English judge as at best a "fanciful phrase."⁵⁰ The

⁴⁹ Pollock on Torts, 8th ed., p. 348.

⁵⁰ Brett, Master of the Rolls, in *Wandsworth Board of Works v. United Telephone Company*, (1884) 13 Q. B. D. 904, at p. 915. In this case it was held that the maxim had no application to streets and highways, for the reason that only such property passes to the community as is necessary for and appurtenant to their use as such.

view here favored, by which the land-owner's rights in the airspace are regarded as strictly appurtenant to the soil and to be accorded only when essential to the enjoyment of the latter, will tend to reconcile the interests of the land-owner with the progress of the new art. The latter is deserving of every reasonable encouragement through law. On the other hand, it should not be over-favored at the expense of individual interests. There are extremists who declare indeed that the whole of the airspace is a highway free for all, or if not so already, it must be so declared by legislation, or by an exercise of eminent domain. Apart from the legality or practicability of such a procedure, the discussion of which would lead us too far afield, it is well to remember the primitive philosophy so naïvely expressed by Lord Coke, and which is true to-day as it was then:

This element of the earth (the land) is preferred before the other elements: first and principally, because it is for the habitation and resting place of man; for man cannot rest in any of the other elements, neither in the water, air or fire.⁵¹

The solution of the conflict of interests seems to have been accomplished very well on the continent of Europe. Even before the advent of progress in air navigation, the Code of the Canton of Grisons provided: ⁵²

Property in land extends to the airspace (above) and the earth beneath, so far as these may be of productive value to the owner.

The German Civil Code ⁵³ also recognizes the extension of property upwards and downwards, but in a clause ⁵³ for which air navigation was largely responsible, ⁵⁴ it is declared:

But the owner can not prohibit such interferences undertaken at such a height or depth that he has no interest in the prevention.

The Swiss Code reaches the same result by an affirmative statement that property in land extends in the airspace and under the

⁵¹ Coke upon Littleton, *ut cit.*

⁵² In effect 1862; § 185.

⁵³ German Civil Code (in effect 1900), § 905.

⁵⁴ Meurer, *op. cit.*, p. 14.

⁵⁵ To take effect 1912; § 667.

earth so far as there is any material interest in the exercise of ownership.

The opening of the airspace to the aërial navigator brings with it, on his part, concomitant responsibility. The law of gravitation is constant and inevitable and he who seeks temporarily to overcome its effects must reckon with an extraordinary responsibility for injuries to person or property in the event of failure. "We have powers of controlling the material world and holding its various energies ready to be directed to our ends which were wholly unknown to our forefathers. With those powers have come risks which were equally unknown to them."⁵⁶ If the owner of land upon a highway is held to the duty of insuring safety as against objects falling and injuring the passer-by, how much more should the aërial navigator be held to a like degree of responsibility. Meili well points out that in the modern world we are supposed to look forwards, on both sides of us and behind us and now we are called upon to look even above us!⁵⁷ A New York case⁵⁸ decided in 1822, thus early manifested the inclination of the judiciary, for there an aëronaut was held responsible not only for the direct damage caused by the descent of his balloon into the garden of the plaintiff, but even for the remote damage caused by the crowding of strangers upon the property to satisfy their curiosity.

Numerous other question of private law suggest themselves in connection with the development of air navigation but none are considered by the writer as ripe for useful discussion at this time.

(B) *Criminal Law.*

It is a common observation that modern technical discovery greatly increases both the facility with which crimes are committed and the difficulty of detecting and capturing the offender. This applies also to the development of aërial navigation. Irrespective of crimes

⁵⁶ Pollock & Wright, *The Expansion of the Common Law*, pp. 125-6.

⁵⁷ *Das Luftschiff und die Rechtswissenschaft*, p. 14. In the event of collision between voyaging air craft, the determination as to who is the guilty party will be a fine point indeed for the solution of the sufferers beneath! *Ibid.*, p. 15.

⁵⁸ *Guille v. Swann*, (1822) 19 Johns. 381; 10 Amer. Dec. 234.

of violence made possible from above and the increased difficulty of capture suggested by a new medium of escape, crimes of a fiscal nature, such as smuggling, must be dealt with in ways yet to be devised. In countries like our own, with long land boundaries and sparsely settled frontiers, aircraft, once become of frequent use, will present serious problems to customs authorities. Major Baden-Powell sees for all states great difficulty in the detection of smuggling when pursued in the air, especially at night and under certain weather conditions. He arrives at the rather hasty conclusion "that customs, in the main, will have to be abolished."⁵⁹ It is interesting to note the ease with which the Britisher mentally arrives at a result which, to say the least, would startle the average American observer.

Much discussion has been devoted in Europe in respect of the proper jurisdiction to take cognizance of crimes committed aboard aircraft. This again is largely due to the analogy sought to be drawn from principles determining the jurisdiction for crimes committed upon the high seas. Furthermore, it is realized that voyaging aircraft may readily escape from the jurisdiction of the state below and, in case of an offence begun and completed in the air, the peace of that state may have been violated in only a very narrow sense. It has been thought desirable to make the national state always competent, assuming of course that aircraft will be nationalized in the manner of ships of the sea. Thus, in Fauchille's draft code we find the following provision:⁶⁰

Crimes and delicts committed on board of aircraft by members of the crew or other persons on board, no matter in what part of the airspace, fall under the competence of the tribunals of the nation to which the aircraft belongs and shall be judged according to the laws of such nation, no matter what be the nationality of the authors (of crime) or the victims (thereof).

This would deprive the local state of the jurisdiction which circumstances might make it desirable if not imperative for it to have. It also violates the basic principle of Anglo-American legal practice, which is territoriality. Jurisdiction should be concurrent, not ex-

⁵⁹ "Law in the Air," in *National Review*, March, 1909, pp. 78, 82.

⁶⁰ Article 15, *Annuaire* of the Institute of International Law, 1902, p. 51.

clusive, just as it is today in respect of offences committed on foreign vessels in territorial waters. We approve, however, of the further provision (Art. 15, 2) which makes the tribunals of a state against the security or fisc of which an offence has been committed competent under all circumstances. The prevailing rule of international law renders them competent, provided the offender is arrested within the injured state.⁶¹ The new feature of the project consists in that it contemplates a surrender to the injured state.

It has been suggested⁶² that the problems presented by the introduction of aerial navigation may give impetus to a movement between the nations, the desirability of which has often been discussed, for a general conventional regulation of the conflicts of jurisdiction in respect of crimes.

Time and experience will doubtless establish imperative rules for observation in the use of aircraft of such supreme importance as to require sanction by criminal penalty. As these laws will be corollaries to laws of administration, it is not conceived within the limits of this paper to discuss them. It may be remarked, however, that with this penal liability on the part of the navigator, there should also be a concomitant protection for the navigator and his passengers similar to that afforded by modern legislation to other means of travel involved in delicate and peculiar risks, such as the railroad.⁶³

CONCLUSION

Within the limits of the present paper, we have attempted to outline and discuss only legal problems of initial importance. It is one of the notable differences between the Anglo-Saxon and the Continental method of jurisprudence that by the former, the law is regarded as predominantly an evolutionary growth resting upon custom and actual experience, while by the latter, it is more often

⁶¹ Wharton, Criminal Law, 10th ed., §§ 274, 275.

⁶² Meili, *Das Luftschiff im internen Recht und Völkerrecht*, p. 43, n. 8.

⁶³ See e. g. New York Penal Code, § 1991. This section enumerates a large number of offenses specifically directed against security of travel upon railroads; "if thereby the safety of any person is endangered, the offense is punishable by imprisonment for not more than twenty years."

an object of conscious development. Continental jurists have dealt with the present topic in a manner characteristic of their legal philosophy. They have given consideration to questions of such detail as, for example, the nationality to be ascribed to persons born on board of voyaging aircraft,⁶⁴ rights in respect of salvage, the doctrine of average and the like, drawn from problems of the law maritime. Though not inappreciative of the thoroughness displayed in such treatment, we believe that it is inadvisable to anticipate actual conditions, which must ever constitute the basis for legal deductions of a permanent character.

As we have indicated, many of the questions are administrative rather than fundamental and in respect of these, the jurist and legislator must coöperate with the technician. In European countries, a tendency is noticeable toward subjecting air navigation, in at least some of its forms, to the monopolistic control of the state. In countries like our own, more favorable to private enterprise, concessionary control will suffice, coupled nevertheless with a strict governmental supervision by registration, license and inspection. The Federal Government may properly take action in so far as the regulation of *interstate* intercourse is concerned. We would express the *vœu* (if it be not too visionary) that the *States* proceed in their legislation with some degree of uniformity and coöperation. Likewise the administrative problems of *international* intercourse will be worked out in due time with the technical assistance of experts. A general conventional regulation would appropriately deal with such matters as emblems, rules of the road (lateral and vertical), signals and ceremony. The draft code to which reference has been made refers to these and also provides regulation for the carrying of official documents such as the registry, brevet, charter-party, manifest and log.

We have seen that agreement is more difficult in respect of the use of aircraft in war. It is regrettable that, failing to agree upon a limitation of the old forms of armament, the nations are not in unison in prohibiting the use of the new. However, we would not

⁶⁴ See e. g. Alex. Meyer, *Die Erschliessung des Luftraumes in ihren rechtlichen Folgen*, pp. 30-32.

wish to conclude with a pessimistic note. Many features will tend to make for peace. The individuals most responsible for the declaration or pursuit of a war may now, as never before, be subjected to immediate and personal danger. Just as modern methods of warfare have largely caused the disappearance of cavalry, so the advent of the aerial battleship now promises a further drastic change. Some say it "means simply the abolition of infantry and cavalry, and the end of land war as we now know it."⁶⁵ The confinement of war within narrower limits of time, space and the number of persons involved, is assuredly a desirable end in itself. Furthermore, the advent of the aerial warfare presents a possibility for high armament without the exhausting economic drain coincident with the maintenance of armies and navies as now constituted, while the annihilative qualities of the newest forces, by a familiar process of reasoning, tend indirectly toward the preservation of peace.

ARTHUR K. KUHN.

⁶⁵ Dienstbach and McMechen, *op. cit.*, p. 350.

PREScription¹

Of the two kinds of prescription, acquisitive (acquisition by usucaption) or extinctive, the latter has more frequently received the consideration of claims commissions and to it we desire first to particularly address ourselves.

In the *Pious Fund* case before a tribunal of the Hague Permanent Court of Arbitration, it was held that the rules of prescription related exclusively to the domain of civil law and could not be applied to the international conflict between the United States and Mexico.² Nevertheless, in the *Gentini* case,³ the umpire pointed out the distinction between rules of prescription, which were such as would be established by a government, and the principle of prescription which he said was "well recognized in international law," and could be applied as well in a conflict to which a state was a party as to a conflict between private individuals.

One of the earlier cases in which the matter was discussed was that of *Black* and *Stratton* before the Mexican-American Claims Commission of 1868,⁴ Thornton, umpire, not feeling justified in condemning the Mexican government upon weak evidence as to the illegality of the acts of its authorities and after more than fifteen years had elapsed without the claimants having made any complaint whatever of the conduct of those authorities.

In the *Mossman* case⁵ the same umpire said:

It seems unfair that the latter (the Mexican government) should be first informed of the alleged misconduct of its inferior authorities more

¹ Chapter from a forthcoming work on the subject of "Arbitral International Law and Procedure," being a résumé of law and practice as laid down by arbitral tribunals; prepared by Jackson H. Ralston, late Umpire of the Italian-Venezuelan Mixed Commission, and editor of "Venezuelan Arbitrations of 1903," etc.

² U. S. Agent's Report, *Pious Fund* Case, pages 17 and 876.

³ Ven. Arb. of 1903, p. 720.

⁴ Moore: *Arbitrations*, 3139.

⁵ Moore: *op. cit.*, p. 4181.

than fifteen years after the date of the acts complained of. The umpire can not under this circumstance consider that the Mexican Government can be called upon to give compensation for a very doubtful injury, and he therefore awards that the claim be disallowed.

The preceding umpire of this commission, Colonel Lieber, evidently felt the influence of the ideas above expressed, for in the *Selkirk* case⁶ he refers disapprovingly to the fact that the claimant had allowed nearly twenty full years to elapse before the presentation to Mexico of his claim.

The same question as to the right to invoke prescription in favor of a nation before a mixed claims commission arose in the United States and Venezuelan Claims Commission of 1889,⁷ in the *Williams* case, wherein the commission argued at great length and with marked ability in favor of the application of the principle of prescription. Among other things, they say:

It thus appears then that the claim was not brought to the attention of the Venezuelan government until twenty-six years after its inception. Its ownership, nature and amount were such as would have made a delay in presentation to the debtor for a single three-months a matter of surprise. By lapse of time the means of defence have been impaired and there is total want of excuse for the long delay by claimant. Under such circumstances, what does the law require at our hands?

It is a well settled principle in common law jurisdictions, and a recognized one in civil law countries, that obligations are to be enforced according to the *lex loci fori* which here is the treaty and the public law. Beyond the requirement that its decisions must be according to justice, the treaty furnishes no guide to the Commission respecting the operation of the lapse of time in extinguishing obligations. It is left to the direction of international law on the subject. Does that recognize the doctrine of such extinguishment as between states, in controversies like these?

* * *

It may be well preliminarily to note that, while individual interests are involved, these controversies, as elsewhere seen, are between States in some sense, and stand much as if so originating; and, further, that while the texts will be seen largely to relate to territorial acquisitions, the principles announced comprehend the acquisition and loss of personal property and pertain to other rights as well. * * *

Prescription is a "rule" of inference; not necessarily perhaps that debts have been paid or titles granted, or other particular thing done, but

⁶ Moore: *op. cit.*, p. 3130.

⁷ Report, p. 51; Moore: *op. cit.*, p. 4181.

that something at least has transpired which, in the natural order, as the Civilians say, forms a basis and demand for its operation. It is no more the creature of legislative will than is any other induction. That the lapse of time variant according to circumstances, needed to raise a rational presumption of a past occurrence, happens to coincide in a particular case with the statutory period in that behalf, does not make prescription and statutory limitation one. They are always distinct. The former relates to substance, is the same in all jurisdictions, and aims at justice in every case. While the latter pertains to process, varies as a rule in all jurisdictions, and from time to time often arbitrarily in the same one, and admits occasional individual injustice. Lord Coke, as seen, thought prescription "abideth" at common law notwithstanding the "estate."

* * * To withhold causelessly a demand for goods sold until the witnesses to the transaction and other usual means of ascertaining the facts have, in ordinary course, passed away, is negligent conduct; while to withhold a bond issued by public authority and of which presumptively a public register is kept for a like time after maturity, may not be.

Wharton in his second edition remarks (appendix to third volume) "While international proceedings for redress are not bound by the letter of specific statutes of limitation, they are subject to the same presumptions as to payment or abandonment as those on which statutes of limitation are based. A government can not any more rightfully press against a foreign government a stale claim, which the party holding declined to press when the evidence was fresh, than it can permit such claims to be the subject of perpetual litigation among its own citizens. It must be remembered that statutes of limitation are simply formal expressions of a great principle of peace which is at the foundation not only of our own common law but of all other systems of civilized jurisprudence."

The commission cited in support of its position the opinions of many law writers in addition to those above referred to, among others being Vattel, Phillimore, Hall, Polson, Calvo, Vico, Grotius, Wheaton, Taparelli, Sala, Sir Henry Maine, Brocher, Domat, Burke, and Markby.

The position taken by the above named commission in the *Williams* case was followed in the *Cadiz* case ⁸ (also cited as the case of *Loretta G. Barbarie*), wherein it was said:

Time itself is an unwritten statute of repose. Courts of equity constantly act upon this principle, which belongs to no code or system of municipal judicature, but is as wide and universal in its operation as the range of human controversy. A stale claim does not become any the less

⁸ Moore: *op. cit.*, p. 4199; Report of Commission, p. 73.

so because it happens to be an international one, and this tribunal in dealing with it can not escape the obligation of a universally recognized principle, simply because these happens to be no code of positive rules by which its action is to be governed.

Again, in the *Driggs* case,⁹ this commission used the following language:

Twenty-eight years had elapsed since the alleged wrong by the Columbian Government, and not a complaint had been made by Driggs! There is not a case on our list that better illustrates the wisdom of the prescriptive rule. The evidence is contradictory, and the actual witnesses to the essential transactions on the part of the Government had presumably passed away, for their evidence was not procured when the claim was asserted.

Before the commissions sitting in Caracas in 1903, the question first arose in the *Spader* case, Bainbridge, American Commissioner, speaking for the commission,¹⁰ holding that,

A right unasserted for over forty-three years can hardly in justice be called a "claim." * * *

It is doubtless true that municipal statutes of limitation can not operate to bar an international claim. But the *reason* which lies at the foundation of such statutes, that "great principle of peace," is as obligatory in the administration of justice by an international tribunal as the statutes are binding upon municipal courts.

This subject received more lengthy consideration in the *Gentini* case,¹¹ above referred to, than in any other before the Caracas commissions. In this case the claimant, seeking to recover for injuries inflicted upon him in 1871, did not appear before the Venezuelan authorities, or even ask the legation of Italy, his country, to make his demand until 1903, a period of thirty-two years. After distinguishing, as above indicated, between national rules of prescription and the principles of the same subject, and adding to the many international law authorities cited in the *Williams* case, the names of Bello¹² and Bluntschli,¹³ the umpire referred to the civil law writers, including

⁹ Report, p. 403.

¹⁰ Ven. Arb. of 1903, p. 161.

¹¹ Ven. Arb. of 1903, p. 720.

¹² *Derecho Internacional*, p. 42.

¹³ *Droit International*, section 279.

Savigny,¹⁴ Troplong,¹⁵ and Laurent,¹⁶ as showing that prescription was a right of humanity. He found the common-law writers on prescription and the cognate title of laches reaching a like conclusion and considered that

all the arguments in favor of it [prescription] as between individuals exist equally as well when the case of a national is taken up by his government against another, subject to considerations and exceptions noted at the end of this opinion. For may not a government equally with an individual lose its vouchers, particularly when, if any existed, they are in the hands of far distant subordinate agents? If there be collusion between claimant and official, will not government witnesses die as readily as those of private individuals? If the claimant's own action be the cause of the misfortunes of which he complains, will not knowledge of the fact be lost with the flight of time? May the claimant against the government, with more justice than if he claimed against his neighbor, virtually conceal his supposed cause of action until its investigation becomes impossible? Does equity permit it? And this brings us to a further point. We are told with truth that this is a Commission whose acts are to be controlled by absolute equity, and that equity will not permit the interposition of a purely legal defense as prescription is said to be. But is this position correct? As appears from the foregoing citations, the principle of prescription finds its foundation in the highest equity—the avoidance of possible injustice to the defendant, the claimant having had ample time to bring his own action, and therefore if he has lost, having only his own negligence to accuse.

The umpire referred to the *King* and *Gracie* case,¹⁷ to be hereafter discussed, as constituting a possible exception, as well as to the fact that in the *Williams* case (*supra*) it had been recognized that the time which would bar an account might not affect a bond as to which a public register had been kept. He also adverted to the fact that presentation of a claim to competent authority within proper time would interrupt the running of prescription.

Shortly after there was presented to the same umpire the *Tagliaferro* case,¹⁸ in which Venezuela insisted upon prescription as a sufficient defense. But the umpire said:

¹⁴ Droit Romain, volume 5, sections 237 and 245.

¹⁵ Droit Civil Expliqué, title "Prescription," vol. 1, page 14.

¹⁶ Vol. 32, page 23, section 12.

¹⁷ United States and British Claims Commission of 1855, Report, p. 309; Moore: *op. cit.*, p. 4179.

¹⁸ Ven. Arb. of 1903, p. 764.

Here the acts complained of were committed pursuant to the orders of the highest military authority of the State. The injured party at once appealed to the judicial authority, which denied relief, and then to the immediate representative of the nation, who, upon a subterfuge, refused his assistance. The responsible constituted authorities knew at all times of the wrongdoing, and if the complaint was baseless — an impossible conclusion under the evidence — judicial, military, and prison records must exist to demonstrate the fact. When the reason for the rule of prescription ceases, the rule ceases, and such is the case now.

About the same time there was also presented to the same umpire the *Giacopini* case,¹⁹ and thirty-two years having elapsed, prescription was again invoked as a defense by the Venezuelan government. But the umpire said that,

Examination of the expediente in the present case shows that the tribunal before which the proofs were made (in November, 1872), directed notice to the fiscal of the nation before their taking; that he was present and vigorously cross-examined the witnesses; that he asked and was accorded by the judge a copy of the evidence. The Government, knowing in this manner of the existence of the claim had ample opportunity to prepare its defense. As was stated in the *Gentini* case, "the principle of prescription finds its foundation in the highest equity — the avoidance of possible injustice to the defendant." In the present case, full notice having been given to the defendant, no danger of injustice exists, and the rule of prescription fails.

In the case of *Corwin*,²⁰ Little, Commissioner, speaking for the commission, referring to the time of its last presentation, said:

Venezuela had then been a state thirty-three years. The demand was thirty-nine years old. It had been presented to the old Republic and not allowed. Venezuela now could not be supposed to have anticipated its resurrection. The witnesses to the transaction in 1824 had presumably, passed away, and other means of defence become dissipated. But owing to the possible incompleteness of the record in this regard, we prefer to base our conclusion upon the other grounds stated, assuming proper and timely presentation of the claim against Venezuela.

Quite extended consideration of this subject was given by Plumley, umpire of the British-Venezuelan Commission²¹ in the *Stevenson* case, he stating in the course of his discussion that,

¹⁹ Ven. Arb. of 1903, p. 765.

²⁰ Report, U. S. & Ven. Com. of 1889, p. 119.

²¹ Ven. Arb. of 1903, p. 327.

When a claim is internationally presented for the first time after a long lapse of time, there arise both a presumption and a fact. The presumption, more or less strong according to the attending circumstances, is that there is some lack of honesty in the claim, either that there was never a basis for it or that it has been paid. The fact is that by the delay in making the claim the opposing party — in this case the Government — is prevented from accumulating the evidence on its part which would oppose the claim, and on this fact arises another presumption that it could have been adduced. In such a case the delay of the claimant, if it did not establish the presumption just referred to, would work injustice and inequity in its relation to the respondent Government.

We have already referred to the fact that where the government possesses, or may properly be expected to possess, in its archives official records which would control the disposition of the claim, as in the case of bonds, claims for taxes and duties paid, etc., the principle of prescription may not be applied, and this consideration would have been amply sufficient to justify the opinion of Upham, American Commissioner, speaking for the commission in the *King and Gracie* case,²² wherein he said :

The first question arising for the consideration of the commission is, whether any legal bar on account of lapse of time exists against sustaining the claim for a return of duties. This seems now hardly to be contended for. Where a treaty is made between two independent powers, its stipulations can not be deferred, modified, or impaired by the action of one party without the assent of the other. If the parties, by their joint act, have established no barrier in point of time to the prosecution of any claims under a treaty made by them, then neither country can interpose such limit. The case admits of no other judicial construction. The legal advisers of the crown concur in this view, and the commissioners have no doubt on the point. It is conceded, as a matter of fact, that an inequality in duties existed in violation of the provisions of the treaty; and, there being no bar to the recovery of the claim from lapse of time, such duties shall be refunded.

But negligence on the part of the claimant government in pressing for a disposition of a case to which the attention of the respondent government has once been directed, can not be invoked as a ground of prescription. This appears to have been first recognized by Sir

²² United States and Great Britain Claims Commission of 1855, Report, p. 309; Moore: *op. cit.*, p. 4179.

Edmond Monson, arbitrator of the *Butterfield* claim of the United States against Denmark, he saying: ²³

The Danish Government, on the other hand, argues, in the first place, that, setting aside the original merits of the case altogether, the amount of time which was allowed to elapse before the claim was first presented, and the intermittent manner in which it was subsequently pressed, constitute in themselves a conclusive objection to the validity of the claim. It appears convenient to settle this preliminary point at once; and the arbitrator has no difficulty in deciding that, although neither Butterfield and Company nor the United States Government have used due diligence in the prosecution of the claim, and have thereby exposed themselves to the legitimate criticism of the Danish Government on their dilatory action, the delay caused thereby can not bar the recovery of just and reasonable compensation for the alleged injuries, should the further consideration of the merits of the case result in the decision that such compensation is due.

The same position was taken by Plumley, umpire, in the *Stevenson* case,²⁴ which claim, it appeared, had been brought to the attention of the Venezuelan government in 1869, and it had announced to the representative of the British government that, owing to civil warfare, Venezuela could not attend to the arrangement or payment of it. Later it seemed that the case had been brought up before the Venezuelan government and placed among its list of "unrecognized" claims, after which time the British government had kept track of this claim with others of its class, waiting for such time as a general settlement could be made and had taken advantage of the first opportunity to present it. The umpire said:

The delay has been either in the inability or the unwillingness of Venezuela to respond to this claim. The occasion of this unwillingness and the reasons why it was placed on the list of "unrecognized" claims are properly matters for proof and consideration before this Commission, but it would be evident injustice to refuse the claimant a hearing when the delay was apparently occasioned by the respondent Government.

In the *Roberts* case before the American-Venezuelan Commission,²⁵ Bainbridge, Commissioner, speaking for the commission, said that the claim

²³ Moore: *op. cit.*, p. 1205.

²⁴ Ven. Arb. of 1903, p. 327.

²⁵ Ven. Arb. of 1903, p. 142.

was brought to the attention of the Venezuelan government within a few days after its inception. The essential facts which fixed the liability of Venezuela were not then and are not now denied. The contention that this claim is barred by the lapse of time would, if admitted, allow the Venezuelan Government to reap advantage from its own wrong in failing to make just reparation to Mr. Quirk at the time the claim arose.

The award was, therefore, given in favor of the claimant.

It has, however, been held that the defense of prescription is one to be pleaded, and in the *Daniel* case,²⁶ Paúl, Venezuelan Commissioner of the French-Venezuelan Commission, in delivering an opinion, the results of which were accepted by his associate, said:

The reason upon which all legislations base the right of the debtor to invoke prescription as a means of extinguishing an obligation is the abandonment in which the creditor has for a number of years left the exercise of his right, the legal presumption of payment arising therefrom. Prescription has not been invoked before this Commission in the present case by the Government of Venezuela, wherefore it can not of its own motion take it into consideration, in conformity with the principles which govern.

Acquirement of title by possession

It is interesting to note that in the treaty between Venezuela and Great Britain for the determination of the conflicting boundaries between British Guiana and Venezuela, the principles upon which the arbitrators should act were laid down as follows:²⁷

(a) Adverse holding or prescription during a period of fifty years shall make a good title. The arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription.

(b) The arbitrators may recognize and give effect to rights and claims resting on any other ground whatever valid according to international law, and on any principles of international law which the arbitrators may deem to be applicable to the case, and which are not in contravention of the foregoing rule.

(c) In determining the boundary line, if territory of one party be found by the tribunal to have been at the date of this treaty in the occupation of the subjects or citizens of the other party, such effect shall be given to such occupation as reason, justice, the principles of international law, and the equities of the case shall, in the opinion of the tribunal, require.

²⁶ Ven. Arb. of 1903, p. 507.

²⁷ Moore: *op. cit.*, p. 5018.

In discussing as to the elements constituting sufficient possession to give title, the arbitrators between Austria and Hungary,²⁸ relying upon Heftner-Geffcken,²⁹ and Rivier,³⁰ held that:

Immemorial possession is one which has lasted for so long a time that it is impossible to furnish the proof of a different situation and which no person can remember having heard spoken of. Beside such possession should be uninterrupted and uncontested. It goes without saying that such possession should also have lasted up to the moment when the dispute and the conclusion of a *compromis* took place.

The American members of the Alaskan Boundary Tribunal under the treaty of 1903, referring to the exercise of sovereignty as constituting possession, said:³¹

For more than sixty years after the Treaty, Russia, and in succession to her the United States, occupied, possessed, and governed the territory around the heads of the inlets without any protest or objection, while Great Britain never exercised the rights or performed the duties of sovereignty there, or attempted to do so, or suggested that she considered herself entitled to do so.

Again:³²

Upon the purchase of Alaska by the United States in 1867, the officers of the United States took formal possession, with appropriate ceremonies, of the territory at the head of the Lynn Canal, and the officers of the Hudson's Bay Company surrendered the possession which they had therefore held as tenants to Russia, and departed, leaving the head of the Lynn Canal in the possession of the United States. From that time performed the duties and exercised the powers of sovereignty there.

Bearing upon the same point of the exercise of sovereignty as constituting possession, in the arbitral decree of Victor Emanuel over the question of a frontier between British Guiana and Brazil,³³ said:

That the right of the United Kingdom of Great Britain, as successor to Holland, to whom the colony belonged, bases itself upon the exercise

²⁸ Revue de Droit International, 2d Series, vol. 8, p. 207.

²⁹ Das Europäische Völkerrecht, 8th ed., pp. 39 and 155.

³⁰ Droit des Gens, 1896, p. 182.

³¹ Report, p. 49.

³² *Idem*, p. 63.

³³ Revue Générale de Droit International Public, 1904, Documents, p. 18.

of the rights of jurisdiction on the part of the Holland West India Company, which, deprived of sovereign powers by the Dutch government, indulged in acts of sovereign authority over certain localities of the zone in litigation, governing commerce which for a long time was exercised by the Dutch controlling it, submitting it to the orders of the governor of the colony, and succeeding in causing the indigenous inhabitants to recognize partially the power of this functionary; that these acts of authority and of jurisdiction with regard to the merchants and the indigenous tribes were continued in the name of the British sovereignty when Great Britain took possession of the colony belonging to Holland, that such an effective affirmation of the rights of sovereign jurisdiction gradually developed and was uncontradicted, and that it came to be accepted little by little even by the indigenous independent tribes inhabiting the regions, which could not be regarded as included within the effective domain of the Portuguese sovereignty and thereafter of the Brazilian sovereignty; that in consequence of these successive developments of the power of jurisdiction, the acquisition of the sovereignty on the part of Holland at first and later on the part of Great Britain was effectuated over a certain part of the territory in litigation.

The same decision is interesting in its discussion as to what under certain circumstances constitutes insufficient possession, for it says:

The discovery of new ways of traffic in regions which belong to no state, can not be considered of itself a ground of sufficient efficacy for determining that the sovereignty of this region remains acquired by the state whose citizens have made the discovery; that to acquire the sovereignty of a region not within the domain of another state, it is indispensable to effectuate its occupation in the name of the state which proposes to acquire the domination; that occupation can only be considered as accomplished after the taking of effective possession, uninterrupted and permanent, in the name of the state, and that the simple affirmation of the rights of sovereignty, or the intention manifested to desire to render the obligation effective, can not suffice; that the taking of effective possession of one part of the region, while it may be esteemed as efficacious in order to acquire the sovereignty of the entire region when this constitutes a single organism, can not be esteemed efficacious for the acquisition of the sovereignty over an entire region when on account of its extent or of its physical configuration, it can not be considered as an organic unity *de facto*; that consequently, all things considered, one can not admit as established that Portugal first and Brazil afterward have realized the effective taking of possession of all the territory contested, but one can recognize only that these states have put themselves in possession of certain localities of the same territory, and that they have there exercised their sovereign rights.

Necessarily, perhaps, involved in this discussion is the question as to the proper bounds of actual possession, and we find it stated in the decision of the arbitrators between Austria and Hungary, above referred to, that,

The opinion of the expert, in which the tribunal shares, rests upon the provisions of international law, which does not recognize rivers as having the character of frontiers, but accords it rather to mountains.

JACKSON H. RALSTON.

NOTES ON RIVERS AND NAVIGATION IN INTERNATIONAL LAW

NATIONAL STREAMS

When the entire course of a river passes through the territory of but a single state, it is generally agreed that a right of exclusive control is possessed by the territorial sovereign which may, therefore, bar the navigation of the stream by foreign nations. Any privileges of transit enjoyed by their vessels are always understood to be subject to the consent of the local state.¹ Thus, with respect to such rivers as the Mississippi and the Hudson, foreign countries enjoy no right of navigation.²

INTERNATIONAL STREAMS — IN NORTH AMERICA

The Mississippi

When a river is navigable within two or more countries, questions arise as to the nature and extent of the duty of a riparian state to permit the navigation of the waters within its own territory by foreign vessels. It is to be ascertained whether the duty towards states not bordering on the river is identical with that towards other riparian countries; also whether there is a distinction between the obligation with respect to a riparian neighbor up stream, and that towards another down stream.³ The United States has long been confronted with these problems.

¹ See, for example, Westlake, I. 144; Oppenheim, I. 226. But see *contra*, Bluntschli, *Droit International Codifié*, 5th ed., § 314.

² Declares Professor Moore: "It is not doubted that rivers such as the Hudson and the Mississippi, which are navigable only within the territory of one country, are subject to that country's exclusive control." (American Diplomacy, pp. 82-83.) See also, Mr. Foster, Secretary of State, to Sir Julian Pauncefote, British Minister, Dec. 31, 1892, U. S. For. Rel., 1892, 335, 337; Moore, Int. L. Dig., I, 626-627.

³ Concerning the navigation of rivers generally, see E. Englehardt, "*Historie du*

According to Article VIII of the treaty of peace between the United States and Great Britain of 1782-1783, it was agreed that the navigation of the Mississippi from its source to the ocean should remain forever open to the respective citizens and subjects of those countries.⁴

As the consequence of its treaty with Great Britain of September 3, 1783, Spain acquired East and West Florida, thereby securing sovereignty over the territory on both sides of the Mississippi at its mouth.⁵ The United States thereupon sought Spanish recognition of a right of navigation through the lower waters to the sea.⁶ After

droit fluvial conventionnel," Paris: 1889; Communication to the Institute of International Law, *Annuaire*, IX, 156; A Bergès, "*Du régime de navigation des fleuves internationaux*," Toulouse: 1902; Bibliography in Clunet, *Tribune Générale*, I, 462-465, 882-883; Schuyler, *American Diplomacy*, 265-305, 319-366; J. B. Moore, *American Diplomacy*, 82-86; E. Nys, "*Les fleuves internationaux traversant plusieurs territoires*," *Rev. D. I. L. C.*, 2 ser., V, 517; Woolsey, 6th ed., 79-83; Oppenheim, I, 226-229; Westlake, I, 142-159; Dana's *Wheaton*, 274-288; Lawrence, 186-189; Calvo, I, 433-465; Bonfils-Fauchille, 4th ed., 288-296; Martens, II, 345-355; Rivier, I, 221-229; Liszt, 3d ed., 216-228; Hall, 5th ed., 131-140.

⁴ U. S. Treaties in Force, 1904, 290.

⁵ See letter from the Minister of Spain to Mr. Pickering, Sec. of State, May 6, 1797. *Am. State Pap.*, *For. Rel.*, II, 15.

⁶ Mr. Jefferson, Secretary of State, in support of the claim of his government, relied first upon Article V of the treaty between Great Britain and France of February 10, 1763, providing for free navigation of the Mississippi by the subjects of those countries; secondly, upon the treaty of peace between the United States and Great Britain of 1782-1783; and finally, upon the "law of nature and nations." He asserted that the sentiment was written in deep characters on the heart of man that "the ocean is free to all men, and their rivers to all their inhabitants." Accordingly, he declared that: "When their rivers enter the limits of another society, if the right of the upper inhabitants to descend the stream is in any case obstructed, it is an act of force by a stronger society against a weaker, condemned by the judgment of mankind." He said that the writers on the subject were agreed that an innocent passage along a river was the natural right of those inhabiting its borders above; that although this right was regarded as an inherited one, inasmuch as the modification of its exercise depended to a large degree on the convenience of the nation through whose territory foreign vessels passed, it was nevertheless: "still a right as real as any other right, however well defined; and were it to be refused, or to be so shackled by regulations, not necessary for the peace or safety of its inhabitants, as to render its use impracticable to us, it would then be an injury, of which we should be entitled to demand redress. The right of the upper inhabitants to use this navigation is the counterpart to that of those possessing the shores below, and founded in the same

protracted negotiations a treaty was concluded, October 27, 1795. With respect to the Mississippi it was declared in Article IV that:

His Catholic Majesty has likewise agreed that the navigation of the said river, in its whole breadth, from its source to the ocean, shall be free only to his subjects and the citizens of the United States, unless he should extend this privilege to the subjects of other Powers by special convention.⁷

According to Article III of the Jay treaty, concluded with Great Britain the previous year, the United States had agreed that the Mississippi should, according to the treaty of peace of 1782-1783, be "entirely open to both parties."⁸ In 1796 the United States and Great Britain annexed to the Jay treaty an explanatory article with reference to the navigation of the rivers and waters of the contracting parties, to the effect that no stipulations in any convention subsequently concluded should be understood to derogate in any manner from the rights of commerce and navigation of their respective citizens and subjects for which provision had been made in their agreement of 1794.⁹

Spain protested, contending that this article was in derogation of the Spanish treaty of 1795, which, it was asserted, was the basis of the American right of navigation.¹⁰ It is to be observed that the treaties concluded by the United States with both Great Britain and Spain purported to secure rights of navigation for the contracting

natural relations with the soil and water." He said also: "We might add, as a fifth *sine qua non*, that no phrase should be admitted in the treaty which could express or imply that we take the navigation of the Mississippi as a *grant* from Spain. But, however disagreeable it would be to subscribe to such a sentiment, yet, were the conclusion of a treaty to hang on that single objection, it would be expedient to waive it, and to meet, at a future day, the consequences of any resumption they may pretend to make, rather than at present, those of a separation without coming to any agreement." (Instructions to Messrs. Carmichael and Short, Commissioners to negotiate a treaty with Spain, March 18, 1792. Am. State Pap., For. Rel., I, 252-257.)

⁷ *Id.*, I, 547; U. S. Treaty Vol. (1776-1887), 1007.

⁸ U. S. Treaty Vol. (1776-1887), 380-381.

⁹ U. S. Treaty Vol. (1776-1887), 395.

¹⁰ See correspondence in May, 1797, between Mr. Pickering, Sec. of State, and the Spanish Minister. Am. State Pap., For. Rel., II, 14-15, 16-17.

parties exclusively. No general principle as to the freedom of navigation of international rivers was expressed. The language of the convention with Spain gave some foundation for the contention that the right of the United States to navigate the Mississippi was a grant from his Catholic Majesty.

By the acquisition of Louisiana and the Floridas the United States, by virtue of the treaties respectively with France of April 30, 1803, and with Spain of February 22, 1819, acquired ownership over the lower banks of the Mississippi and its tributaries. That river thereupon became a national stream.¹¹

The St. Lawrence

In view of the principles previously asserted by Secretaries Adams and Clay, as well as by Messrs. Rush and Gallatin, the adjustment of the issue between the United States and Great Britain concerning the St. Lawrence is significant.¹² In consideration of sacrifices regarded as equivalent in value, the United States, according to Article IV of the reciprocity treaty of June 5, 1854, secured temporarily the right of free navigation; and that, by virtue of a convention terminable on one year's notice.¹³

¹¹ It had been supposed by the negotiators of the treaty of 1782-1783 with Great Britain, that the source of the Mississippi was in Canada, and that the boundary line should run from the most northwestern point of the Lake in the Woods on a due west course to the Mississippi. As a matter of fact such a line did not intersect that river. (See Moore, *Int. L. Dig.*, I, 625; also Moore, *Int. Arbitrations*, I, 705-707.)

¹² See *Am. State Pap., For. Rel.*, VI, 757-777. An excellent summary of the several arguments in support of the claims advanced by the United States is contained in Moore, *Int. L. Dig.*, I, 631-635.

¹³ *U. S. Treaty Vol.* (1776-1887), 448, 451-452. The provisions of Article IV for the navigation of the St. Lawrence and Canadian canals used as a means of communication between the Great Lakes and the Atlantic by citizens and inhabitants of the United States on the same basis as British subjects, contained also the declaration that the British Government retained the right to suspend the privilege on giving due notice thereof, and that in case of such suspension the United States might suspend also the operation of Article III (providing for the free admission of certain articles specified into the British Colonies and into the United States), for such period as the rights of navigation were suspended. Article IV also gave to British subjects the right to navigate Lake Michigan for

According to Article XXVI of the treaty of Washington of May 8, 1871, the navigation of the St. Lawrence ascending and descending to and from the sea, from the point where the river ceased to be the international boundary

Shall forever remain free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of Great Britain, or of the Dominion of Canada, not inconsistent with such privilege of free navigation.¹⁴

The Yukon, Porcupine and Stikine. The St. John. The Columbia

Article XXVI of the treaty with Great Britain of May 8, 1871, provided for the free navigation forever of the rivers Yukon, Porcupine, and Stikine, ascending and descending to the sea, to the citizens and subjects of the two countries, subject to any regulations of either country within its own territory not inconsistent with free navigation. Thus, the United States, the lower riparian proprietor of those Alaskan rivers, secured a right of navigation through the upper waters wholly within British territory.¹⁵

a term of years. The United States engaged also to urge the State governments to give British subjects the use of the State canals on terms of equality with the inhabitants of the United States. It was further agreed that duties should not be levied by Great Britain on Maine lumber floated down the river St. John and its tributaries, when shipped to the United States from New Brunswick. Concerning this article see comment of Hall, 5th ed., 138.

¹⁴ U. S. Treaties in Force, 1904, 344.

¹⁵ U. S. Treaties in Force, 1904, 344. "This stipulation is understood to secure 'the right of access and passage,' but not 'the right to share in the local traffic' between American and British ports, as the case may be." (Moore, Int. L. Dig., I, 635, citing Mr. Adee, Second Assistant Sec. of State, to Mr. Woodbury, Jan. 6, 1898, 224 MS. Dom. Let. 229.) See also, *id.*, I, 635-636.

Concerning the whole article, see also Schuyler, *American Diplomacy*, 290-291.

Article XXVII contains an engagement by the British Government to urge upon that of the Dominion to secure for the inhabitants of the United States on terms of equality with those of the Dominion, the use of the Welland, St. Lawrence, and other canals; the United States, on the other hand, engaging that British subjects may on similar terms enjoy the use of the St. Clair Flats; and also to urge the State governments to secure for such subjects, on like terms, the use of the several State canals connected with the navigation of the lakes or rivers traversed by or contiguous to the international boundary. (U. S. Treaties in Force, 1904, 344-345.)

With respect to the navigation of the river St. John where it passes through British territory, Article III of the treaty of August 9, 1842, provided for the free access to the sea of lumber (not manufactured) grown in such parts of Maine watered by the river St. John, or its tributaries, through that waterway to and from the seaport at its mouth, and to and around the falls of the river; such lumber while within the Province of New Brunswick to be treated as if it were the produce of that Province. Furthermore, there was to be no interference with the regulations not inconsistent with the terms of the treaty made by the sovereign of both banks.¹⁶

According to Article II of the treaty of June 15, 1846, the north branch of the Columbia River within American territory as far as the junction with the main stream, and thence down that stream to the sea was opened to the Hudson's Bay Company and to all British subjects "trading with the same," subject, however, to such regulations not inconsistent with the treaty as the United States might prescribe.¹⁷ Professor Moore calls attention to the fact that:

The treaty contains no stipulation with regard to the navigation of the river within British territory.¹⁸

The Colorado, and the Rio Grande

By its treaties with Mexico concerning the Colorado and the Rio Grande rivers, the United States, the upper riparian proprietor,

¹⁶ U. S. Treaty Vol. (1776-1887), 434-435. Concerning the right of New Brunswick under the treaty to impose an export duty on all timber shipped from the province, including that floated down from Maine, see Moore, *Int. L. Dig.*, I, 636-637, and documents there cited.

Article XXXI of the treaty of May 8, 1871, contained an engagement by Great Britain to urge upon the Parliament of the Dominion and the Legislature of New Brunswick that no export or other duty should be imposed on lumber of any kind in that part of Maine watered by the St. John and its tributaries, and floated down that river to the sea, when the same was shipped to the United States from the Province of New Brunswick. (U. S. Treaties in Force, 1904, 345.)

¹⁷ U. S. Treaties in Force, 1904, 325.

¹⁸ *Int. L. Dig.*, I, 639. Concerning the claims of the Hudson's Bay Company, see Moore, *Int. Arbitrations*, I, 253, 262. See communication of Mr. Bayard, Sec. of State, to Mr. Lundy, July 25, 1885, in which a distinction is made between the rights of the upper and lower riparian inhabitants. 156 MS. Dom. Let., 358; Moore, *Int. L. Dig.*, I, 639.

secured rights of navigation over the lower waters to the sea where such streams pass wholly through Mexican territory. It is to be observed that no provisions have been made for the free navigation by inhabitants of Mexico of such waters as pass through the territory of the United States.¹⁹

Conclusions

From the practice of the United States concerning rivers in part traversing or bounding its own territory, the following conclusions may be drawn:

First, no right of navigation has been exercised in foreign territory or permitted in American territory except by virtue of a treaty.

Second, no treaty has declared it to be a principle of international law that international navigable rivers are generally open to navigation by vessels of foreign riparian or non-riparian states.²⁰

Third, the United States, as upstream proprietor, has on one occasion accepted a treaty the terms of which justify the contention that the right of navigation was conferred as a grant by the lower proprietor; and on others has made substantial concessions for the privilege of access to the sea.

Fourth, in two cases where the upper stream has passed wholly within the territory of a single state, no permission has been given to inhabitants of the lower to navigate the foreign waters.

Fifth, the right of a state to make all reasonable regulation for all navigation within its own territorial waters has been generally recognized.

¹⁹ See Articles VI and VII of the treaty of Feb. 2, 1848, the latter of which contains the stipulation that neither Government "shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right [of free navigation], not even for the purpose of favoring new methods of navigation. Nor shall any tax or contribution, under any denomination or title, be levied upon vessels or persons navigating the same, or upon merchandise or effects transported thereon, except in the case of landing upon one of their shores." U. S. Treaty Vol. (1776-1887), 685. See also, Article IV of the treaty of December 30, 1853, U. S. Treaties in Force, 1904, p. 529. The substance of relevant provisions of the two treaties is contained in Moore, Int. L. Dig., I, 639.

²⁰ Compare, however, Art. XXVI of treaty between the United States and Bolivia of May 13, 1858, with respect to the rivers Amazon and La Plata, U. S. Treaty Vol. (1776-1887), 98.

INTERNATIONAL STREAMS — IN SOUTH AMERICA

South America is traversed by systems of rivers which, together with their numerous confluent, afford navigable channels of access to the sea to several countries, and so furnish indispensable means of communication with the outside world. To oversea as well as riparian states bordering the upper waters, the vast importance of free navigation has been apparent. The United States has constantly urged the opening of such waters to all maritime commerce, and has entered into treaties favorable to that end.²¹ One of them with Bolivia, declares freedom of navigation to be a principle of international law.²² Others refer to it as a concession of control by the territorial sovereign.²³

Brazil, across whose territory the main waters of the Amazon and its tributaries make their way to the ocean, asserts that the right of free navigation claimed by any foreign state depends wholly upon treaty.²⁴ By a decree of December 7, 1866, Brazil declared the Amazon should be "opened to vessels of all nations" from September 7, 1867, as far as the frontiers of Brazil.²⁵

²¹ Concerning the efforts of the United States to secure free navigation of the Amazon, see Moore, *Int. L. Dig.*, I, 640-645, and documents there cited; Schuyler, *American Diplomacy*, 329-344.

Mr. Marcy, Sec. of State, in a communication to Mr. Trousdale, Minister to Brazil, Aug. 8, 1853, declared: "You are instructed to claim for our citizens the use of this natural avenue of trade. This right is not derived from treaty stipulations—it is a natural one—as much so as that to navigate the ocean—the common highway of nations. By long usage it is subject to some restrictions imposed by nations through whose territories these navigable rivers pass. This right, however, to restrict or regulate commerce, carried to its utmost extent, does not give the power to exclude such rivers from the common use of nations." (*MS. Inst. to Brazil*, XV, 215; Moore, *Int. L. Dig.*, I, 642, 643.)

²² See Article XXVI, treaty of May 13, 1858, U. S. Treaty Vol. (1776-1837), 98.

²³ Thus, Article I of the treaty with the Argentine Confederation of July 10, 1853, declares that the country "in the exercise of her sovereign rights, concedes the free navigation of the Rivers Paraná and Uruguay, wherever they may belong to her." (*U. S. Treaties in Force*, 1904, 22.) See also, Article II of the treaty with Paraguay of Feb. 4, 1859, U. S. Treaties in Force, 1904, 618.

²⁴ See Baron Rio-Branco, Minister for Foreign Affairs, to Mr. Seeger, American Consul-General, February 20, 1903, U. S. For. Rel., 1903, 43; Moore, *Int. L. Dig.*, I, 646.

²⁵ As to the various Brazilian decrees with reference to the navigation of the

By a law of May 14, 1869, and a decree July 1, 1869, Venezuela opened the Orinoco and its branches to foreign merchant vessels.²⁶

The right of South American riparian countries to regulate navigation within their own domain had been generally recognized.²⁷ The enjoyment of privileges of navigation by foreign vessels has always been the result of a treaty or of the domestic decree of the territorial sovereign.

INTERNATIONAL STREAMS — IN EUROPE

The navigation of European rivers such as the Rhine and the Danube has long been the subject of international agreement.²⁸ The Act of the Congress of Vienna of 1815 announced the principle of the freedom of the entire courses of international rivers to the commerce of all nations, subject, however, to regulations of police; and declared also the necessity for international control or regulation by representatives of the riparian states.²⁹ The principle was there-

Amazon, see Moore, *Int. L. Dig.*, I, 645; *Brit. & For. State Pap.*, LVIII, 551, 552-567; *Diplomatic Cor.*, 1867, II, 256, 257; *U. S. For. Rel.*, 1899, 123.

With respect to the permission granted by Brazil at various times to American warships, and particularly to the U. S. S. *Wilmington*, to ascend the upper Amazon, see *U. S. For. Rel.*, 1899, 115-124; Moore, *Int. L. Dig.*, I, 648-649.

²⁶ Moore, *Int. Arbitrations*, II, 1696-1698. Concerning the concession in 1873 to General Perez of an exclusive right of navigating the Orinoco, see *id.*, II, 1701, citing *Sen. Ex. Doc.*, 139, 50 Cong. 1, sess. 32.

See also, extract from report of Colombian Minister of Foreign Affairs in 1894, *U. S. For. Rel.*, 1894, 193, 200; Moore, *Int. L. Dig.*, I, 651; also, reasoning of the Umpire in the Faber case, sustaining certain Venezuelan decrees suspending traffic on the river Zulia during 1900, 1901 and 1902. *Ralston & Doyle's Reports (Venezuelan Arbitrations, 1903)*, 600, 620; also bibliographical note of the reporters, *id.*, 603.

²⁷ As to the effect of the Brazilian Constitution on the right of that state to impose transit taxes, see opinion of Mr. L. Renault, *U. S. For. Rel.*, 1903, 38-39.

Concerning the closing to vessels in the foreign trade of certain channels of the Orinoco by Venezuela in 1893, as a regulation of navigation in that river, and the attitude of Mr. Gresham, Secy. of State, see *U. S. For. Rel.*, 1893, 729; *id.*, 1894, 794; Moore, *Int. L. Dig.*, I, 649-650; also additional documents there cited.

²⁸ Concerning the navigation of European rivers, see Moore, *Int. L. Dig.*, I, 628-631, and authorities cited; Woolsey, 6th ed., 80-81; Schuyler, *American Diplomacy*, 345-363; Westlake, I, 142-151.

²⁹ See Articles 108 to 117, *N. R.* 11, 427-429; see also, Moore, *Int. L. Dig.*, I, 628; Oppenheim, I, 227; Schuyler, *American Diplomacy*, 345-363.

upon applied to the Rhine, and provision made for its extension to certain other streams. Its application to the Danube was accomplished by Article XV of the treaty of peace of Paris of March 30, 1856.³⁰

GENERAL CONCLUSIONS

The practice of nations generally with respect to the navigation of international rivers has been based upon commercial necessity, and has, therefore, been shaped by geographical conditions rather than by any other. In North America since the Mississippi has become a national stream, but three countries, and in most discussions only the United States and Great Britain, have been interested in the navigation of their common rivers. European streams have been commercially important to several states, riparian and non-riparian, within relatively close proximity to each other. Freedom of navigation to vessels of commerce generally has been a natural consequence. Access to those rivers has, however, for geographical reasons been of relatively small consequence to maritime states of other continents.

South American rivers, on the other hand, as has been observed, have afforded a sufficient and solitary channel of communication between the Atlantic and several states remote therefrom. For that reason freedom of navigation has been a matter of concern to oversea states, however distant. Such nations have, therefore, sought to secure freedom of navigation.

The practice of maritime states during the past century or more justifies the following conclusions:

First, that any right of navigation is dependent upon the consent of the territorial sovereign.

³⁰ *N. R. G.*, XV, 776, translated in Westlake, I, 149. See also, Moore, *Int. L. Dig.*, I, 630.

The Congo: Art. II of the General Act of the Berlin Conference of 1885, made provision for the free navigation of the Congo and the Niger, as well as their tributaries, and established an international commission for their control. *N. R. G.*, 2 ser., X, 417, translated in Westlake, I, 155; see also, British Order in Council regulating navigation of the Niger, August 10, 1903, *Brit. & For. State Pap.*, XCVI, 230.

Concerning the opening of the Persian river Karun in 1888 to foreign merchant vessels, see Moore, *Int. L. Dig.*, I, 652.

Secondly, that the law of nations imposes upon such sovereign the duty to yield its consent to the navigation of its own waters by the inhabitants of any other upstream riparian state.

Thirdly, that where a river and its tributaries afford the sole means of water communication between several riparian states and the ocean by reason of a channel of sufficient depth to be of general commercial value, it becomes the duty of any riparian state bordering the lower waters to consent to the free access to countries upstream by all foreign merchant vessels.

Fourthly, that in the absence of arrangement for international regulation, the territorial sovereign may exercise large discretion in the control of navigation within its own waters.

CHARLES CHENEY HYDE.

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EDITORIAL COMMENT

THE SECRETARY OF STATE AND THE JAPANESE HONORARY COMMERCIAL
COMMISSIONERS

On November 3, 1909, Mr. Keishiro Matsui, Chargé d'Affaires of the Japanese Embassy at Washington, celebrated the birthday of the Mikado by an elaborate dinner, to which were invited the Honorary Commercial Commissioners of Japan then in the United States, Secretary Knox, Attorney-General Wickersham, Secretary Ballinger, Commissioner Macfarland, various members of the local board of trade and chamber of commerce, officials of the government and private citizens interested in maintaining the friendly relations and increasing, if possible, the good understanding happily subsisting between the United States and Japan.

The occasion was international in character and the presence of the Secretary of State and his address, which was the principal one of the evening, well-nigh invested it with the importance of an official gathering. As the address of the Secretary of State set forth in happy and concise language the relations between the United States and Japan, the desire of the United States for the advancement not merely of its own interests but those of the Empire of Japan, the closer need of an enlarged exchange of the products of each, the settlement of controversies that may arise between the countries by the peaceful method of arbitration, it is not inappropriate, indeed it is essential, that it be given in full:

It is my privilege and a great pleasure to welcome you to Washington on behalf of this government, and to express the sincere hope that your journeyings and observations and entertainments in this country have been, and will continue to be, comfortable and profitable and agreeable to you. May health and kindly courtesies and good cheer attend you wherever you go, and may your return voyage across the seas to your own beautiful country be a safe and happy one.

This is an opportunity of which I gladly avail to speak of the ties which have continued to unite our two nations in amity and essential harmony ever since the days when to American representatives first of all, you opened your doors for the reciprocal exchange of good will and civilization and trade. We have learned from you as you from us. We admire you for all of your national gifts and virtue, and not the least for those qualities in which you differ from us; for the eminent qualities drawn from a long and glorious past through which you must teach and we must learn. Is it your word "bushido" that expresses the source and inspiration of much of the strength and nobility of the Japanese temperament? Then let western chivalry, which also looks back to lofty origins, learn what eastern "bushido" has to teach.

Because of these ties between us we sometimes share a common grief and mourning. This country mourns with you the untimely, cruel death of the great Prince Ito, which to those among us like the President, who knew him as a personal friend, was a deep personal loss. He was justly a hero of Japan, a great man, a noble self-sacrificing patriot, a statesman of masterly constructive ability. His career is the history of the new Japan, of the Japan which is now one of the great modern powers of the world. A gifted Englishman of letters has told a fine story of the career and work of Yoshida, whose pupil Prince Ito was, and describing Yoshida's intensity of patriotic virtue has used language which well describes Ito himself.

He hoped, perhaps, to get the good of other lands without their evil; to enable Japan to profit by the knowledge of the barbarians and still keep her inviolate with her own arts and virtues.

Is it too much to say that such hopes of the great minds of Japan are in the way of realization? Japan has set herself in that path, and every friendly and generous heart believes she will keep the faith and hopes she will attain her goal.

But you already have and will expect keen yet friendly rivalries, which are only the stimulating competitions of the struggle toward excellence going on everywhere at all times. Commerce, exchange, markets, trade-extension — these are the fields in which the friendly commercial rivalry now proceeding between the American and Japanese peoples finds expression. Each, indeed, furnishes a wide market for the other, and beyond their respective boundaries they engage in this friendly trade competition for the various markets of the world, and will continue so to engage. It is doubtless true that trade and trade extension are the foundation in practical life of most advances in civilization. But the great modern movements of accord and good understanding between nations are after all the lofty achievements and the crown of all international relations. The controlling principle of these movements is peaceful and beneficial international intercourse, and the peaceful settlement by arbitration of differences and controversies — extending that principle, by friendly diplomacy, as rapidly as possible to embrace an increasing number and variety of disputes, and ultimately by voluntary international compacts making peaceful settlements of all differences compulsory or practically so.

I am confident that you will agree that it is altogether in accordance with the honorable and enlightened attitude both of Japan and the United States and that it should be the aim of true statesmanship, to continue to keep abreast of these beneficent movements in which they have borne so distinguished a part.

Thus the long and unbroken friendship of the United States and Japan, of which your visit and this occasion are such happy symbols, and the laudable common purpose of Japan and the United States to respect each other's rights, and with frankness, patience and good temper to adjust such differences as inevitably arise even between nations of sympathetic and common purposes will be exemplars, which will bear fruit and aid in the gradual realization of the noblest ideals for the unity, concord and prosperity of the world.

In reply to the Secretary of State, Baron Shibusawa gracefully referred to arbitration and the desire of his country not merely to resort to it when necessary, but so to conduct its affairs as to prevent the necessity of resorting to it.

I am in hearty accord with the declaration of the Secretary of State on the great importance of arbitration, but we want to direct the commercial relations of the two countries to the benefit of each nation, that even a resort to arbitration will not be necessary. It is the ambition of Japan so to conduct her commercial competition as to have no misunderstanding with any other nation.

The declaration of the Secretary of State in favor of arbitration, and the desire of the Japanese Commissioner that the conduct of Japan be directed so as to render even the recourse to arbitration unnecessary, may be taken as the authoritative statement of the aims and policies of the two great nations, and it can not be doubted that the declarations themselves and the circumstances under which they were made render them deeply significant and important.

It should be added that the various addresses delivered in English were immediately translated into Japanese and the Japanese addresses were redelivered in English, so that the guests of both nationalities were given an opportunity to understand and appreciate in their own languages the full import of the various addresses. It is a subject of congratulation that the address of the Secretary of State was translated into Japanese and read by Mr. R. S. Miller, chief of the bureau of far eastern affairs of the Department of State.

MEETING OF PRESIDENT TAFT AND PRESIDENT DIAZ ON OCTOBER 16, 1909

In former times the meetings of sovereigns were events of moment and they are popularly supposed to exercise great influence upon the foreign policies of their respective countries. There can be no doubt that the meetings are useful, because an exchange of views by intelligent people upon questions of policy may tend to remove misunderstandings, if they unfortunately exist, and may lead to a more correct understanding of the aims and ambitions of the sovereigns charged with the direction, if not government, of their various countries. It is not easy to discuss difficult subjects by letter, and the peaceful development of the world has called the diplomat into being in order to serve as a mouthpiece of the foreign office; and, although it is maintained that serious questions between nations are really determined by the foreign offices, not by diplomatic agents, it is too clear for argument that the mere presence of a diplomat at his post is important, that personal discussion by him of the policies of his country with the foreign office not only clears up doubts and difficulties, but enables the policy of the home government to be realized if it be based upon reason and justice.

There is no reason to doubt that the personal interviews of sovereigns subserve the same useful purpose and that the frequency of such interviews makes for peace instead of conspiracies against the rights and liberties of foreign nations. The visits of the German Emperor are so frequent that he is popularly and sympathetically known as the *Reise-kaiser*, and in a spirit of banter the present King of Great Britain is known as the "commercial traveler," a designation not wholly undeserved if we consider the changed state of affairs since his accession, due, it would seem, in large measure, to his personal acquaintance with his brother rulers and the frequent exchange of visits with them.

Fortunately, there are no outstanding difficulties between the sister republics of Mexico and the United States, but there can be no doubt

whatever that the recent meeting on October 16, 1909, of President Taft with President Diaz upon American and Mexican soil brought into full relief the friendship of the two countries and is in itself evidence of the fact that their cordial relations are destined to continue and, if possible, to become still closer and sympathetic. Presidents do not often have the opportunity of meeting, but if the good results popularly attributed to the visits of sovereigns be justified, it would seem to follow necessarily and be too clear for argument that the frequent exchange of visits, however formal, between the chief executives of our sister republics would be an advantage not merely to the countries as such but to their fellow citizens. The example set by President Taft and President Diaz can not be too highly commended, and it is to be hoped that the example will be followed, not merely commended.

WILLIAM INSCO BUCHANAN

The sudden and tragic death of the Honorable William Insko Buchanan on October 16, 1909, closed a singularly interesting and rounded career, a source of just pride to his relatives and friends and of importance to the country he served in various capacities and always successfully during the past decade and more.

Mr. Buchanan was born in Ohio September 10, 1853, and was peculiarly and in no figurative sense of the word self-made, for from earliest childhood he was dependent upon his own exertions and never enjoyed the opportunities of our public schools, not to speak of the universities. And yet, in a certain measure, all success is made and all our successful men are self-made. Training in schools and universities help a young man to do what without their aid he must do alone and perhaps under adverse circumstances; but success in life, in our country at least, is made; it is not inherited.

Settling in Sioux City, Iowa, in 1882, it was there that he first attracted the attention of the public by organizing the Corn Palaces, a conspicuous feature in the western States during the eighties. It is interesting to note that his connection with the Corn Palaces not only brought him before the public, but attracted the favorable attention of President Cleveland who appointed him to his first public position, namely, Democratic member from Iowa to the World's Columbian Exposition, and while Mr. Buchanan was serving as chief of the department of agriculture (1890) and in charge of the live-stock and forestry depart-

ments of the World's Fair (1891) appointed him envoy extraordinary and minister plenipotentiary to the Argentine Republic (1894), a post which he filled during the ensuing six years.

Mr. Buchanan took his duties as minister very seriously, took lessons in Spanish and acquired an easy and conversational knowledge of the language, and studied with the deepest interest and sympathy not only the institutions and customs of the Argentine, but the character and characteristics of the Latin-American. Able to converse with them in their own language he acquired in familiar intercourse their personal and national point of view and, approaching their problems with sympathy, he inspired their confidence to such a degree as to be looked upon rather as a friend and adviser than as a stranger among them. A signal instance of their confidence in him as a man and appreciation of his impartial judgment was his selection by the Chilean and Argentine governments as arbiter in the special commission to fix the boundary in the Puna de Atacama, and as arbitrator he succeeded in fixing the boundary line between Chile and the Argentine Republic between latitudes 23° and 26°, 52' 45" north, thus terminating a dispute marked with bitterness and illfeeling between the two countries.

Returning to the United States, he was director-general of the Pan-American Exposition held at Buffalo in 1901, and a year later was delegate of the United States to the Second Pan-American Conference. The official report of the conference gives no adequate conception of Mr. Buchanan's very important and delicate rôle, for it is well-known that a failure to discuss compulsory arbitration at the conference would have caused the withdrawal of one section of the representatives and that a discussion of it would have resulted in the secession of the other representatives. Through the intervention of Mr. Buchanan it was agreed that partisans for and against should hold separate meetings outside of the convention, that the members of the conference should as a whole accept the Hague Conventions and that thereupon the resolutions adopted by partisans and opponents should be reported and spread upon the minutes thus enabling the partisans of each view to present in permanent form their views, without disturbing the regular order of affairs in the conference and permit the conference as a whole to accept the Hague Conventions. It was at one time not improbable that the Second Pan-American Conference would have broken up had it not been for the timely intervention, practical wisdom, conciliatory manner and the great judgment and tact of Mr. Buchanan.

Mr. Buchanan's successes at the Second Pan-American Conference, due not merely to his conciliatory attitude but to his profound and sympathetic knowledge of Latin-America, designated him as peculiarly qualified to represent the United States at Panama just after its separation from Colombia and its recognition by the United States in 1903. Mr. Buchanan was therefore sent as first minister of the United States to Panama, where he met and solved the various problems which presented themselves with his unvarying tact, skill and success.

In 1907 Mr. Buchanan was one of the delegates of the United States to the Second Hague Peace Conference, and upon his return from The Hague represented the United States in the Central American Peace Conference held in Washington in the months of November and December 1907. The conference was composed of the five states of Central America and resulted in a general treaty, several minor agreements, and above and beyond all, in the establishment of the Central American Court of Justice. Through the generosity of Mr. Carnegie, a building was provided for the court at Cartago, Costa Rica, and in June 1908 Mr. Buchanan, as the representative of the United States, was present at its opening. Within the first year of its creation the tribunal justified its establishment, for by accepting jurisdiction in the complaint of Honduras against Guatemala and Salvador for unneutral conduct, and by ordering the preservation of the status quo, it prevented an outbreak of war in Central America.

For years the relations between Venezuela and the United States had been unsatisfactory; diplomatic relations had been severed owing to the refusal of Venezuela either to arbitrate or to settle claims of American citizens against Venezuela which the Government of the United States thought to be just. Upon the overthrow of President Castro's government, Mr. Buchanan was sent as special commissioner to Venezuela and by forbearance, tact, an understanding of the people with whom he was to negotiate and a masterly knowledge of the cases themselves, he succeeded in settling two of the cases, namely, the case of the New York & Bermudez Company and recovered an indemnity for the expulsion of Jaurett. Three cases of the five were to be submitted to arbitration at The Hague unless they were previously settled through diplomatic channels, and of these three cases two, namely, the cases of the Orinoco Corporation and the United States & Venezuela Company, were satisfactorily adjusted through diplomatic channels. One case, namely, that of the Orinoco Steamship Company against Venezuela remains to be

arbitrated at The Hague; and Mr. Buchanan was properly selected as agent of the Government, and had he lived would have appeared as such before the Hague tribunal in the ensuing year.

It is not possible within the short compass of an editorial comment, even adequately to outline Mr. Buchanan's career or to state in detail his many and substantial claims to public recognition and remembrance; but this brief comment will fail of its purpose if it has not shown him as a sincere believer in the peaceful settlement of international difficulties, a cause which he greatly advanced both in South and Central America. It is in no sense an exaggeration to say that Mr. Buchanan made the world better by having lived in it.

PROPOSAL TO MODIFY THE INTERNATIONAL PRIZE COURT AND TO INVEST
IT AS MODIFIED WITH THE JURISDICTION AND FUNCTIONS
OF A COURT OF ARBITRAL JUSTICE

The Department of State has had under consideration the possibility of a modification of the convention for the establishment of the International Prize Court of such a nature as to disarm any constitutional objections to it on the part of the participating states and has carefully considered the means by which full effect may be given to the recommendation of the recent Hague conference regarding the establishment of the Court of Arbitral Justice.

As a result of the study and reflection, the Department of State believes that not only the International Prize Court may be established with unessential modifications but that at one and the same time the Court of Arbitral Justice may be constituted by investing the Prize Court, as modified, with the jurisdiction and functions of a Court of Arbitral Justice. The Prize Court as constituted at the recent Hague conference presupposes an appeal from a final decision of a national court to the International Prize Court established at The Hague, but as such a system would involve interference with the internal organization of certain countries and very considerable legislation in order to carry it into effect, it has occurred to the Department of State that the desired result, namely, an international determination of controversies arising out of capture, might be secured without interfering with the judicial systems of various countries. It is not the practice of this country to submit decisions of the Supreme Court to arbitration, although from the beginning of the government it has been customary to submit

the question involved in the decision to the consideration and determination of a mixed commission or arbitral tribunal. The results of such submission have been satisfactory, even although the sentences of the mixed commissions have not at all times been in accord with national decisions. Great Britain and the United States have repeatedly adopted this method of settling international difficulties, notwithstanding sentences contrary to decisions of their municipal courts upon the questions involved, and each nation has cheerfully complied with the award of the temporary and mixed tribunals. The Prize Court convention contemplates the award of damages in cases in which the property is no longer subject to national control, and, taking advantage of this alternative method, the Department of State proposes that the *question* involved in the decision of a national court instead of the *judgment* shall be submitted to international and therefore impartial consideration; that the proceedings thereupon to be had shall be in the nature of a trial *de novo*, and that the judgment shall be limited to the assessment of damages where the capture has been found illegal. A decision would thus be had upon the question involved, the judgment of the national court would not be directly involved or reversed upon appeal, and the fundamental purpose of the convention, i. e., the determination of the controversy by a permanent and impartial court composed of fifteen judges, would be obtained. A clause in the instrument of ratification by the Powers consenting to this alternative procedure would permit for the consenting Powers this method of determination and bring the proceedings of the Prize Court within the international practice of enlightened nations.

Great as are the advantages of the International Prize Court and the benefits likely to result from its establishment, the fact is and should not be overlooked that a prize court presupposes the existence of war, because capture of private property of neutrals is only permitted in maritime warfare. The Department of State is, however, unwilling that a war court should be established to the neglect of controversies arising in peace, which, if unsettled, may create an unfriendly feeling and indirectly be the cause of war. Therefore, the Department of State is anxious to secure the establishment of a permanent tribunal competent to pass upon what may be called peaceable controversies and to determine them before national feeling has become aroused.

The project for the establishment of an International Court of Arbitral Justice, introduced by the American delegation to the Second Hague

Conference, was accepted in principle, the draft convention of 35 articles concerning the organization, jurisdiction and procedure of the proposed court was adopted, and the establishment of the court was recommended through diplomatic channels. As the method of composition of both courts was to be substantially the same, i. e., to consist of approximately fifteen judges selected in such a way as to represent the various systems of law as well as the languages in use, and as it is easier to enlarge the jurisdiction of an existing institution than to create a wholly new one, the Department of State after mature reflection has come to the conclusion that it would be feasible to invest the International Prize Court with the jurisdiction and functions of a Court of Arbitral Justice for any and all nations consenting thereto, which could be done without the change of a letter in the draft convention for the Court of Arbitral Justice by the simple expedient of inserting in the instrument of ratification of the International Prize Court a clause permitting the Prize Court and the judges to accept jurisdiction and decide any case of arbitration presented to it by a signatory of the International Prize Court.

Should this proposal, which has already been communicated to the interested nations,¹ meet with their approval, the result would be not merely the establishment of the International Prize Court but the constitution of the Court of Arbitral Justice; and one and the same international tribunal sitting alike in war and in peace, would be competent to decide not merely controversies arising out of war, but controversies which if unsettled might in themselves be the cause of war.

The method proposed is well known in theory and practice, because in our system of jurisprudence one and the same judge administers law and equity, admiralty and prize.

The Department of State is not without precedent in making the proposal, because article 10 was excluded from the convention for the adaptation to maritime warfare of the principles of the Geneva Convention, adopted by the First Peace Conference, upon request of The Netherland government through diplomatic channels for the reason that the article in question was not in conformity with the legislation of certain Powers and was likely to meet with opposition in the parliaments called upon to approve the convention.

¹ For identic circular note of the Secretary of State submitting the proposal to the Powers, see Supplement, p. 102.

It is therefore hoped that a proposition so reasonable in itself and based upon precedent will meet with a friendly response, and that not only the International Prize Court but the Court of Arbitral Justice may be established for the consenting Powers at one and the same time. It is impossible to overestimate the benefits that would accrue from the establishment of this international tribunal, because, permanently in session, it would not need to be constituted; it would always be open to receive and decide cases submitted to it, and the expenses of the court would be borne by the community of nations, thus obviating the delays in the constitution of the temporary tribunal and the large expense incidental to its operation.

PROPOSED EXCHANGE PROFESSORSHIPS WITH LATIN-AMERICA

The Department of State has had under consideration means whereby the friendly relations subsisting between Latin-America and the United States may not only be maintained but increased by calling into operation and organizing the intelligence and intellectual resources of the various countries of the western hemisphere.

The last few years have brought Pan-America into intimate contact and it is to be expected that trade relations will follow in the wake of good understanding, but the Department of State is anxious not merely to foster the interchange of material products, but by an interchange of ideals to create public opinion and sentiment based upon the ideals and the sentiments common to Pan-America, for, geographically, America is a unit; commercially, each of its members is being brought into more frequent contact; and, intellectually, each should contribute to the knowledge of each and to the advancement of all.

The Department of State has, therefore, matured a project and presented it to the Bureau of American Republics in order that the governing board may consider it, and, if it meets with approval, work out the details necessary to carry it into effect. In brief, the project seeks to accentuate the great benefits which would accrue to Pan-America by the establishment of exchange professorships by virtue of which competent professors in our various universities would familiarize Latin-America with American scholarship, expound the aims and purposes of our institutions, the means by which they have been created and maintained and their influence extended, and, in addition, carry to them a message of

sympathy and encouragement with the efforts they are making toward a common goal. On the other hand, the presence of Latin-American professors at our universities would enable us to understand as never before, not merely the difficulties of Latin-America but the progress made in spite of those difficulties, and the visiting professors would inform themselves upon our methods of instruction, our political aims, purposes and ideals, and, on returning to their various homes, would form a center of American influence.

The system of exchange professorships exists between Harvard and Columbia, on the one hand, Berlin and Paris, on the other, and the results already produced by this intellectual exchange amply justify the experiment; but it is evident that the results flowing from the establishment of exchange professorships with Latin-America would be much greater, that the exchange professor would be an important factor in interpreting the aims and policies as well as the scholarship of his country to the country of his mission, and that the international relations of Pan-America would be greatly improved.

Therefore, the Department of State has proposed a system of exchange professorships between the educational institutions of the United States and Latin-America and, without specifying the details of the system, it is obvious that under the general plan to be worked out by the Bureau of American Republics, any university of the United States might exchange professors with any Latin-American university by granting a leave of absence without an increase of salary, although the expenses of travel and transportation should be met either by the interested universities or by a special fund created by the generosity of some donor interested in the movement or by a general contribution from the states composing the Bureau of American Republics.

It is a truism that misunderstandings arise from a lack of acquaintance of the contending parties, and the presence of exchange professors would, undoubtedly, by disseminating knowledge, by bringing the various peoples into close social and intellectual contact, disarm suspicion and create sympathetic and permanent bond.

The Department of State, therefore, feels that the establishment of the system of exchange professorships would not only maintain friendly relations but increase them in force and intensity, and upon the basis of common understanding derived from personal knowledge draw all portions of the American hemisphere into closer contact.

THE CLASSICS OF INTERNATIONAL LAW

An editorial comment in the July number of the JOURNAL upon the proposed republication of the Classics of International Law outlined in general the project undertaken by the Carnegie Institution. A note from the honored pen of Professor Nys,¹ while approving the project as a whole, called attention to certain infelicities of detail which he hoped to see eliminated from the project. Professor Nys' objections were two-fold: first, to the photographic reproduction of the texts; and, secondly, to the English translations proposed to accompany them. In view of the friendly source from which these criticisms emanate and of the real importance of the undertaking, a word of explanation seems advisable.

The photographic method of reproduction was adopted by the Carnegie Institution in order that the exact text of the masterpiece might be reproduced without the possibility of introducing modern misprints or mechanical errors of any kind, so that the student might have before him the source without modification or emendation; for it is to the source as such that the student must resort. Professor Nys calls attention to the misprints, mistakes and abbreviations of the early editions and considers it a mistake to perpetuate them by photographic reproductions. Admitting the force of this view, it is met by the statement that each text will be accompanied by an *apparatus criticus* in which the mistakes of the text will be signalized and corrected, the abbreviations explained, with comment by the editor upon difficulties and obscurities of the text.

It is to be noted that the objections of Professor Nys apply more particularly to the precursors of Grotius and that the texts of Grotius and his successors are comparatively free from abbreviations requiring explanation. It seemed therefore to the Carnegie Institution possible to meet the objection formulated by Professor Nys by adopting a slightly different method of treatment for the predecessors of Grotius without essential modification of the plan and without losing the advantages of photographic reproduction. The earlier texts will therefore be photographed from the original and will be accompanied by a carefully prepared, revised and critical text by the competent individual editors to whom the various texts are entrusted, and the translations will be made under the supervision of the respective editors from the text thus revised. The result will be the exact reproduction of the original source, a modern

¹ *Revue de droit International et de Législation comparée*, second series, Vol. 11, pages 484-485.

text free from the mistakes, inaccuracies, ambiguities and abbreviations of the original text, and a translation for the English reader.

If the student is satisfied by the reproduction of the source and the corrected text, there can be no objection to supplying a translation for the needs of English readers, especially as the translation will appear in all cases as a separate volume.

Professor Nys calls attention to the difficulties of translation and asks who will make them, to which it is replied that the respective editors will be responsible for the translations made under their supervision by competent Latinists; for example, Professor Holland of the University of Oxford is engaged in the preparation of Zouche's *Judicii Fecialis* (1650), for which he will furnish an introduction, an *apparatus criticus*, and be responsible for the translation now in course of preparation by an expert Latinist of his own selection. In the same way Professor Westlake has undertaken the preparation of Ayala's *De Jure et Officiis bellicis et disciplina Militari* (1582) and the translation is likewise to be made by a Latinist of his choice and under his personal supervision. It may be stated further that Professor Holland has undertaken the preparation of the three masterpieces of Gentilis: *De Legationibus* (1585), *De jure belli libere tres* (1598) and the *Advocatio Hispanica* (1613). In addition he will edit Legnano's treatise *De bello, de reprensaliis, et de duello* (written in 1360, but first published in 1477). Each one of these works will be reproduced photographically and wherever necessary will be accompanied by a modern critical text from which the translation will be made by a competent Latinist selected by Professor Holland and under his supervision.

It would appear, therefore, that the objections by Professor Nys are more than met by the Carnegie Institution, which offers the learned student the source, the modern Latinist a revised text, and the average reader an accurate translation, so that the purpose of the Carnegie Institution to popularize international law by making known its sources is likely to be realized. The selection of competent editors of various nationalities, such as Messrs. Renault, Fauchille, de Lapradelle and Politis from France, Holland, Westlake, Lawrence and Oppenheim from England, Asser from Holland, Jellinek and Zorn from Germany, Lammasch from Austria, Matzen from Denmark, Meili and Huber from Switzerland, Nys from Belgium and Fiore from Italy, is at once a guarantee of accurate scholarship and incontrovertible evidence that the series will be international in fact as in theory.

ABATEMENT OF AN INTERNATIONAL NUISANCE

Recent diplomatic correspondence between Mexico and the United States discloses an incident of no slight importance in itself and offers a striking example of how the principles of the common law may be applied by analogy to the settlement of international disputes. Briefly stated, the legislature of California in the year 1908 passed the anti-race track and gambling bill, intended, as the title implies, to prevent, within the State of California, gambling and the lawlessness and disorder usually associated with the race track, and in order to prevent the evils incident to the race track made race-track gambling an indictable offence. As a result of this legislation, the promoters of the race track were unable to pursue their calling in California without rendering themselves liable to the penalties of the statute. By indirection they endeavored to find direction out, and it occurred to them that a race track established in Lower California in Mexico within a few miles of the American border would enable them to circumvent the laws of California and realize a handsome profit, for if the track were established at Tia Juana, some sixteen miles from the city of San Diego in southern California and within easy railroad connection of Los Angeles, they would be able to appeal to the sporting elements within California without bringing themselves within the reach of the California statute. A concession was therefore obtained from the Mexican Government for the establishment of a race track at Tia Juana and arrangements were made for opening the race track in the very near future. The residents of San Diego and of the adjoining country immediately called the attention of the Department of State to the matter and requested that representations be made to the Mexican Government, for if the race track were established in such close proximity to southern California the evils which the statute had sought to prevent would not be suppressed. The town of Tia Juana has but a handful of inhabitants, is in reality a customs station, and is geographically and socially separated from Mexico. The patrons of the turf would be Americans, a flourishing town would spring up for the sole business of promoting gambling, the devotees of the sport would be drawn from the United States and would enter Tia Juana by San Diego and its vicinity and after the races would return to the States via San Diego. In other words a nuisance would be created on the confines of San Diego which the respectable element of southern California requested the influence of the Department of State in order to abate.

The Department of State considered the objections to the establishment of the race track at Tia Juana well founded, and without denying the right of the Mexican Government to grant a concession within its territory, nevertheless called the attention of the Foreign Office to the fact that although Mexican in name, the enterprise was really American in fact and that its sole purpose was to evade the laws of California to the great prejudice of the American inhabitants in the neighborhood of the boundary line between the two countries. The Republic of Mexico gave immediate attention to the request of the Department of State and, on July 6, 1909, amended the regulations on gambling for the territory of Lower California in the following manner:

Sole Article. Horse-racing in the Northern District of Lower California is hereby forbidden.

Transitory Article. The above provision shall take effect on the first day of October next, thus amending for the Northern District of Lower California and according to the above terms, article 1 of the Regulations of December 12, 1907.

There can be no doubt that the United States was justified in calling the attention of Mexico to the attempt of an American association to take advantage of Mexican laws for the sole purpose of using the Mexican frontier to circumvent the laws of California, and the prompt action of Mexico is but another evidence of the traditional friendship existing between the sister Republics. California could not communicate directly with Mexico, for by the constitution of the United States the States surrendered their initiative in foreign affairs to the Union, and in acting for California at its request the United States was practically the agent for California.

It has been said that the Tia Juana incident was in terms of private law a nuisance, and the action of the United States and Mexico was in terms of the common law an abatement of the nuisance. It is well known that a nuisance may be abated by application to the courts of common law or enjoined by a decree in equity, but the right of self-redress exists although its exercise is hazardous. 3 *Blackstone's Commentaries* 5; *Pollock's Torts*, 8th ed., p. 404. Two examples will be taken in order to make clear the principles involved and the advantages of abatement through diplomatic channels or by judicial action.

In 1837, during the Canadian rebellion, the territory of the United States was made the basis of hostile operations, and the steamer *Caroline*, while within the territorial waters of New York, was seized by a party under the command of one Alexander McLeod, an officer of the British

Government, burned and sent over the falls of Niagara. In the struggle for possession of the vessel an American citizen and member of the crew was killed. McLeod acted as the agent of the British Government, and although he was not directed specifically to do what he actually did, his conduct was approved by the British Government and responsibility for it assumed. Three years after the event (1840) McLeod was arrested in Lewistown, New York, tried and fortunately acquitted. It would seem that the courts of New York improperly took jurisdiction because the ratification of McLeod's act by the British Government at once made the controversy one between the United States and Great Britain to be settled through diplomatic channels. Such was the opinion of Mr. Webster, and as a consequence of this incident the *habeas corpus* act was amended to include such a case. (Act of Congress, August 29, 1842, 5 Stats. at Large 539, c. 257, sec. 1; Sec. 753 U. S. Revised Statutes.)

The other incident referred to arose between Georgia and Tennessee. Briefly stated, it appeared that certain copper companies established their works in Tennessee within the neighborhood of the State of Georgia and that the fumes generated in Tennessee passed into Georgia causing considerable injury to property there situated. A bill for an injunction was filed by Georgia in the Supreme Court of the United States and the injunction was granted. The learned court was careful to point out that the case was in reality one between two States and as such was to be decided in accordance with international law, and that if between two independent nations the case would be decided diplomatically because there is as yet no supreme court of nations to which application might be made. As, however, the Supreme Court of the United States was created and exists for settling disputes between the States of the Union, the court would take jurisdiction, but in so doing would consider and decide the case in its larger aspect as governed by international as distinct from the provisions of municipal law.¹

The Tia Juana incident is on all fours with this case, because Mexico, as well as Tennessee, was making a lawful use of its territory, but as the consequences extended across the border and injuriously affected persons and property within the neighboring jurisdiction, a nuisance was created which might properly be and actually was abated. The treatment of the case in the Supreme Court of the United States shows the undeveloped state of international law due to the lack of adequate machinery, and

¹ For the decision in full and for the reasoning by which the court assumed jurisdiction as well as for the judgment, see *Judicial Decisions*, p. 222.

indirectly points out the advantages of an international tribunal by which and through which controversies of a legal nature between states may be decided by judicial means. The prompt action of Mexico prevented controversy, but if controversy had arisen, the appropriateness and the great services to be rendered by a permanent international tribunal are too obvious for argument.

APPOINTMENTS AND PROMOTIONS IN THE DIPLOMATIC SERVICE

An objection generally made to the American diplomatic service is that it lacks permanency and therefore fails to offer the advantages of a career and that appointments to the service are necessarily made from the young men of our country who possess independent means and who regard diplomatic experience as an incident and as a pleasant way of spending a few years in foreign parts. It is generally supposed that the higher appointments are made as a reward for real or alleged services to the party in power, and that the secretaries of legation are chosen by senatorial influence, without regard to the fitness of the appointee.

While it is undoubtedly true that many ministers may have been appointed solely for political reasons, the uniform success of our diplomacy in the past one hundred years is the best evidence that our ambassadors and ministers, whatever the reasons controlling their selection, were men of ability. The instances are very few in which a diplomat, however successful, has survived, that is, has remained at his post, after the defeat of his party at the polls. The removal of Henry Wheaton by President Polk is perhaps the most flagrant example of a system with which we are only too familiar. The removal was often a hardship to the individual; it was generally a loss to the country, because his experience in diplomatic life had rendered his services valuable at the very time his country was deprived of his services, and his successor, taken from private life, lacked diplomatic training. There might have been an excuse for the removal of a minister if he had been succeeded by one equally if not better qualified, but the lack of a diplomatic service from which promotions could be made from the lower to the higher posts rendered an appointment from civil life apparently justifiable if not necessary.

The extension of civil service rules to the secretaries of legation supplies the country with a body of trained diplomatic and the diplomats themselves with the opportunity of a career.

The first step was taken by President Roosevelt upon the advice of Secretary Root, who, on November 10, 1905, ordered

that vacancies in the office of secretary of embassy or legation shall hereafter be filled (a) by transfer or promotion from some branch of the foreign service, or (b) by the appointment of a person who having furnished satisfactory evidence of character, responsibility and capacity, and being thereupon selected by the President for examination, is found upon such examination to be qualified for the position.¹

Taking advantage of section 1753 of the Revised Statutes of the United States concerning the admission of persons into the civil service, President Taft, upon the advice of Secretary Knox, in an Executive Order dated November 26, 1909,² has extended to the diplomatic service the provisions of the Civil Service Act of January 16, 1883, so that hereafter promotions within the service shall be made solely upon efficiency, and appointments to secretaryships in the diplomatic service shall be made only upon examination of persons previously designated by the President. The nature and extent of the examination are set forth in the following quotation from the Executive Order:

The examinations shall be both oral and in writing and shall include the following subjects: — international law, diplomatic usage, and a knowledge of at least one modern language other than English, to wit, French, Spanish, or German; also the natural, industrial and commercial resources and the commerce of the United States, especially with reference to the possibilities of increasing and extending the trade of the United States with foreign countries; American history, government and institutions; and the modern history since 1850 of Europe, Latin America and the Far East. The object of the oral examination shall also be to determine the candidate's alertness, general contemporary information, and natural fitness for the service, including mental, moral, and physical qualifications, character, address, and general education and good command of English. In this part of the examination the applications previously filed will be given due weight by the Board of Examiners. In the determination of the final rating, the written and oral ratings shall be of equal weight. A physical examination shall also be included as supplemental.

Examination papers shall be rated on a scale of 100, and no person with a general rating of less than 80 shall be certified as eligible.

¹ For the order of the Secretary of State prescribing the examination, see Supplement to the JOURNAL, Vol. I, p. 84.

² See Supplement to this number, p. 99.

It is evident, therefore, that the secretary of legation will be prepared for the position at the time of his appointment, and as his promotion depends upon his record in the service, an incentive is supplied for faithfulness and devotion to duty. As the Secretary of State is "directed to report from time to time to the President, along with his recommendations, the names of those secretaries of the higher grades in the diplomatic service who by reason of efficient service have demonstrated special capacity for promotion to be chiefs of mission," a secretary of legation may look to a ministry as his ultimate goal.

The foundations are thus laid for an efficient and permanent diplomatic service and a career is offered to the youth of our country.

INTERNATIONAL CELEBRATIONS

The past eighteen months have been prolific in international celebrations which have served to recall at once the youth of the Republic and the stormy years following the discovery of America until Great Britain established its ascendancy in North America and introduced the English language and established once and for all the type of the nation and its civilization as Saxon.

The various anniversaries have been celebrated by Americans in the larger sense of the word, including the citizens of the United States, subjects of his Britannic Majesty in the Dominion of Canada, and representatives of France who for two centuries maintained the cause of the Latin against the Saxon in the Western Hemisphere. A marked characteristic of the meetings has been the unbroken good humor and uniform cheerfulness notwithstanding the feeling of regret that may have lurked behind the spoken word.

The 300th anniversary of the settlement of Quebec by Champlain in 1608, the 300th anniversary of the discovery by Champlain of the lake which bears his name, the 300th anniversary of the discovery of the noble river which bears the name of Hudson, and the 100th anniversary of Fulton's daring voyage from New York to Albany in the little *Clermont* which demonstrated the feasibility of the steamboat and opened up the possibilities of ocean navigation, were international events of no mean significance and properly treated as such. It therefore seems proper that a few paragraphs be devoted to each and that the importance of each event be viewed in the light of the present.

Quebec Tercentenary.

When Champlain in 1608 landed with his devoted band at Quebec and raised the *fleur de lis*, he dreamed of a new France and he hoped and believed that his country was permanently taking possession of a new world. For a century and a half it seemed that the dream would be realized, but the *fleur de lis* raised by his loving hand as the visible mark and symbol of French sovereignty in the new world was lowered in 1759 on the Plains of Abraham within range of the citadel of Quebec, and with its descent the sovereignty of France vanished from the new world to be revived for only a brief moment in Louisiana. The victory of Wolfe was not merely the defeat of Montcalm; it was the victory of the Saxon over the Latin; it was the triumph of the English language and English institutions which from that day have prevailed in North America. The Atlantic seaboard from the Arctic to the Gulf of Mexico became and remains English. And yet the influence of France did not cease with the surrender of Canada. The French settlers remained and have increased in numbers and influence, and it is perhaps not too much to say that the French-Canadian has prevented the absorption of Canada by the United States and has developed a national spirit already embodied in the Dominion, as it may one day be embodied in a nation.

At the celebration the United States was properly represented by the Honorable Charles W. Fairbanks, Vice-President of the United States, and it is pleasing to note that in Quebec, the storm-center of armed conflict, on the very heights of Abraham where Great Britain and France battled for the supremacy of the new world, Mr. Fairbanks, true to the fundamental conception of the American people that war is a remedy of the past, that arbitration for the peaceful settlement of international disputes is the hope of the future, confessed his faith in arbitration in the following measured sentences:

We confidently believe that we are each destined to play a large and worthy part in the progress of the human race upon the Western continent. We have no rivalries except in the way of peace. We do not covet the other's territories. We covet only each other's neighborly esteem.

There are no fortifications on our frontier, and no battleships upon the waters which divide us, and we believe and fervently hope that there never will be need of any defensive preparation between us.

May we not, on this theater of past conflicts, surrounded now by the impressive monuments of peace, venture to hope that the widespread movement which seeks to insure the maintenance of peace among nations of the world without

invoking the sword, may grow in strength, and at no distant day become incorporated as a part of the fixed policy of nations?

To advocate measures for the maintenance of international tranquillity, to endeavor to substitute arbitration for war force, is not evidence of any decay in the courage or manhood of modern civilization. There is such a thing as righteousness among nations. Let them take their differences into international courts of justice, and there let reason and righteousness prevail.

We have no need to fear that the relations between the United States and Great Britain ever again will be disturbed.

Mr. Fairbanks' tribute on the battlefield to the peaceful settlement of international disputes was as appropriate as is the monument to learning and science, equally opposed to war, which, in the form of Columbia University of the City of New York, graces the battlefield of Harlem Heights.

Three-hundredth Anniversary of the Discovery of Lake Champlain

The discovery of Lake Champlain opened up a highway from Canada to the heart of the English Colonies, and if France had been able to control the line of communication through Lake Champlain and Lake George to the Hudson, English influence might have been confined to New England, if not crushed, and the west delivered to France, just as surely as the success of Burgoyne's expedition would have divided New England from New York and might have stamped the American Revolution as a mere rebellion. If the surrender of Quebec marked the downfall of French influence and ambitions, the failure to acquire and hold the region between Lake Champlain and the Hudson rendered the downfall possible if not a mere question of time. The control of this battlefield, for such it is, by Great Britain in Colonial times and its possession by the Colonies in the struggle with Great Britain, determined not merely that North America should be English in language and institutions, but that the united Colonies should be a free and independent nation.

It was manifestly appropriate that the celebration should be graced by the President of the United States, and that France and Great Britain should be represented. It was also eminently appropriate that the Honorable Elihu Root, formerly Secretary of State and now senator from New York, should entitle his address on this occasion "The Iroquois and the Struggle for America." From Mr. Root's masterly address on this occasion, so in keeping with the magnitude of the events

celebrated and so just in its appreciation of the results achieved, the following paragraphs are quoted:

Of all the peoples of Europe, only the French and the English possessed the power, the energy, the adventurous courage, the opportunity and the occasion, for expansion across the Atlantic. The field and the prize were for them, and for them alone.

For centuries the struggle between civil and religious absolutism on the one hand and individual liberty on the other were waged alike in France and in England. The attempt to colonize America came from one side of the controversy in France and from the other side of the same controversy in England. The virtues of the two systems were to be tried out and the irrepressible conflict between them was to be continued, in the wilderness.

Fortunately for England, between the two parties all along the controlling strategic line from this Lake Champlain to the gateway of the West at Fort Duquesne, stretched the barrier of the Long House and its tributary nations. They were always ready, always organized, always watchful. They continually threatened and frequently broke the great French military line of communication. Along the whole line they kept the French continually in jeopardy. Before the barrier the French built forts and trained soldiers—behind it the English cleared the forests and built homes and cultivated fields and grew to a great multitude, strong in individual freedom and in the practice of self-government. Again and again the French hurled their forces against the Long House, but always with little practical advantage.

So, to and fro the war parties went, harrying and burning and killing, but always the barrier stood, and always with its aid the English colonies labored and fought and grew strong. When the final struggle came between the armies of France and England, the French had the genius of Montcalm and soldiers as brave as ever drew sword; but behind Wolfe and his stout English hearts was a new people, rich in supplies, trained in warfare, and ready to fight for their homes. South Carolina, the records show, furnished twelve hundred and fifty men for the war; Virginia, two thousand; Pennsylvania, two thousand seven hundred; New Jersey, one thousand; New York, two thousand six hundred and eighty; New Hampshire and Rhode Island, one thousand; Connecticut, five thousand; Massachusetts, seven thousand. It was not merely the army—it was that a nation had arrived, too great in numbers, in extent of territory, in strength of independent, individual character, to be overwhelmed by any power that France could possibly produce. The conclusion was foregone. A battle lost or won at Quebec or elsewhere could but hasten or retard the result a little. The result was sure to come as it did come.

In all this interesting and romantic story may be seen two great proximate causes of the French failure and the English success; two reasons why from Quebec to the Pacific we speak English, follow the course of the common law,

and estimate and maintain our rights according to the principles of English freedom.

One of these was the great inferiority of the Indian allies of the French, and the great superiority of the Indian allies of the English; the effective and enduring organization, the warlike power, of the Iroquois, and their fidelity to the "covenant chain" which bound them to our fathers. The other cause lies deeper: It is that peoples, not monarchs, settlers, not soldiers, build empires: that the spirit of absolutism in a royal court is a less vital principle than the spirit of liberty in a nation.

The Hudson-Fulton Celebration.

With the settlement of Quebec in 1608, the discovery of Lake Champlain in 1609, and the entry of the *Half Moon* into the beautiful harbor of New York in the same year, the Hudson Celebration is naturally and inextricably connected, and the voyage of the *Clermont*, with its influence upon the industry and the commerce of the world, indicates, it is to be hoped, an appreciation of the rôle which industry and commerce play in the world's history and that the struggles of the future are to be economic not physical, for industry and commerce presuppose for their normal development peace, and in the trail of peace, prosperity and content follow.

France and England were not the sole contestants for North America. Spain established herself in Florida in 1564; Sweden sought an outlet for its people in Delaware; Holland established itself in New Amsterdam and New Jersey and took by force of arms Delaware from the Swedes. Thus the Gulf of Mexico was controlled by the Spaniard, the English Colonies of the Atlantic seaboard were hemmed in between the Spaniard and the Dutch, and New England was separated by New Netherlands. Settlement, commercial prosperity and the sword declared in favor of the English, who, on the eve of the final struggle, possessed the Atlantic seaboard between Florida and Canada, and at the outbreak of the French and Indian War France and Great Britain alone contended for the mastery of a continent. The *ifs* of history are attractive and we may well speculate upon the future of America if the nations of Europe had maintained and developed their colonies within the present boundaries of the United States. They did not, for reasons too familiar to be chronicled, although at one time it seemed not improbable, at least possible, that they might.

The discovery of the Hudson River by Henry Hudson, an English navigator in the service of the Dutch, raised the hopes of Holland. The

settlement of New Amsterdam, the control of the river to Albany, the subsequent acquisition of New Jersey and Delaware, gave the United Republics a firm foothold on the continent, but the overthrow of the Stuarts, the establishment of the Protectorate, the aggressive policy of Cromwell and his defeat of the Dutch, prepared the downfall of Dutch colonization in America. The English expedition organized by the Duke of York, the conquest of the Dutch colonies due to his initiative and their incorporation into English possessions, not only dispelled the dream of the Dutch but gave geographical unity to British possessions; and, as previously indicated, the possession of New York and the highway from Lake Champlain to Albany not only checked the advance of the French from Canada, but led to the conquest of New France. The celebration, therefore, of the discovery of the Hudson was the celebration of an international event of great importance if judged by its consequences, and it was eminently fitting that it should be international in character as it was international in fact.

The fact that the achievement of Fulton shared equally in the celebration, as evidenced by its name, shows unmistakably that we understand its importance in the progress of the world, and that peaceful private enterprise disconnected with war and the rumors of war is rightly regarded as a factor and not the least influential in the history and development of nations. The settlement of Quebec, the discovery of Lake Champlain, the voyage of Hudson were national acts emanating from sovereignty and conferring sovereignty. The invention of Fulton was the act of an individual and by bringing nations closer together, by exchanging the products of the world and administering to the needs of men, he has enrolled himself among the benefactors of mankind and is rightly entitled to international recognition and celebration.

SECRETARY KNOX AND INTERNATIONAL UNITY

In an address delivered at the annual banquet of the Pennsylvania Society of New York, December 11, 1909, Secretary Knox confessed his faith in international unity and briefly but adequately indicated the steps already taken and those certainly to be taken for international unity while preserving national organization as the basis or unit of international law.

Mr. Knox opened his address with the following apt paragraphs:

"We now know that freedom is a thing incompatible with corporate life and a blessing probably peculiar to the solitary robber; we know besides that every advance in richness of existence, whether moral or material, is paid for by a loss of liberty; that liberty is man's coin in which he pays his way; that luxury and knowledge and virtue, and love and the family affections are all so many fresh fetters on the naked and solitary freeman."

This was said by a distinguished writer referring to the individual units who have constructed the political systems under which society is organized. It applies with equal truth to the governments they have created. Every material and moral advance in the sodality of nations, for universal, as distinguished from local or domestic purposes, is achieved by concessions restraining to a greater or less degree the liberty of action of individual states for the benefit of the community of nations and in obedience to the demands of an international public opinion.

These concessions to international unity have been brought about through international conferences, congresses, associations, and meetings, covering such a wide range of the material needs and moral aspirations of nations as to make it quite impossible even to specify them and their purpose with any particularity. Broadly speaking, however, they have been designed to establish common policies in large political and economic affairs, to secure cooperation in the promotion of international harmony, to assuage human hardships, to elevate the morals of the world, and to secure the blessings of uniform and enlightened justice.

Mr. Knox then analyzed the tendency of modern times toward international unity, and thus enumerates the reasons which are drawing nations closer together:

The tendency of modern times then is manifestly toward international unity, at the same time preserving national organization. International independence and its corollary, international equality, have been recognized from the Congress of Westphalia, in 1648, putting an end to the Thirty Years' war and recognizing the independence and equal right of States irrespective of their origin and religion. Intercommunication has brought nations within easy reach of each other. The development of commerce and industry and the necessary exchange of commodities have caused nations to see that their interests are similar and interdependent, and that a like policy is often necessary as well for the expansion as for the protection of their interests. Independence exists, but the interdependence of States is as clearly recognized as their political independence. Indeed, the tendency is very marked to substitute interdependence for independence, and each nation is likely to see itself forced to yield something of its initiative, not to any one nation, but to the community of nations in payment for its share in the "advance in richness of existence."

As evidence of the tendency toward unification, he specifies the conventions dealing with the following subjects: Telegraph Union, Postal Union, Navigation, Railway Freight Transportation.

While appreciating the value of political conferences as such, Mr. Knox lays stress upon conferences of a non-political character, and thus estimates their importance in international unity:

Many private conferences have been held during the past century and a half and much has been done in that way to bring nations together by showing the identity of interest and the oneness of the world. Political conferences are much more striking, especially if they represent many States and are diplomatic in character, but it is doubtful if these conferences are so genuinely helpful and produce such beneficial results as the less formal and more individual conferences due to private or semi-public initiative which meet with constant and surprising regularity. If we bear in mind that these conferences are usually attended by people of achievement in their various lines and professions, we can readily see what influence they are quietly exerting. No conventions are drawn up, no treaties are negotiated, but the results enter into the life and thought of the nations.

Of political conferences he says the following:

As distinct from the conferences called for economic, commercial or moral purposes, political conferences have been very frequent in the past two centuries. At first they met at the end of war to conclude peace. More recently conferences have been called in time of peace to regulate future warfare. More recently still, indeed within the last generation, conferences have met in time of peace to devise means for preserving peace instead of devising rules for future warfare. These conferences have had one point in common, namely, that the termination of war by the conclusion of peace, the regulation of eventual war and the settlement of difficulties without a resort to war are matters of international concern. However important the acts of these conferences, the fact of their meeting was even more important, for it is evidence that the common interest of nations is being recognized as superior to their special interests and that unity of action in international matters may yet control the unrestrained, unregulated, or isolated action of independent States.

Secretary Knox then refers to the International Prize Court, which has been considered by many competent authorities as the most important result of the Second Hague Conference, and proposes to enlarge its usefulness by investing it with the functions of a court of arbitral justice.

In 1907 The Hague Peace Conference adopted the joint project of the United States, Great Britain, France and Germany for the establishment of an international prize court, whose jurisdiction, as its name implies, extends to cases of prize which can only arise during a state of war.

Very recently the State Department has proposed, in a circular note to the powers, that the prize court should also be invested with the jurisdiction and functions of a court of arbitral justice.¹

The United States as the originator of this project is confidently, yet anxiously, looking forward to its acceptance by the powers, which will give to the world an international judicial body to adjudge cases arising in peace as well as controversies incident to war.

Secretary Knox thus concludes his address, which is certain to be both widely circulated and favorably received:

One is naturally led to speculate upon the fundamental reasons for the remarkable progress and great effectiveness of international cooperation within the last few decades as compared with earlier times. We conjecture whether it is because of broader and more enlightened views common to the nations of the world, or whether it is for some different basic reason. Does it not rest upon the practically simultaneous operation of the common mind and the conscience of the world upon common knowledge? One can readily understand the force and effect of a concurrent expression of international opinion made while the subject upon which it operates is a fresh and burning one as compared with the disconnected and ineffective expression of the same opinion when made at different times after the facts upon which it rests.

Instantaneous world communication is very modern.

Ribs of steel and nerves of wire have not only bound nations together in a single body for many purposes and communicated thought; but have enabled them, sharing a common knowledge, animated by a common conscience, to take common and contemporaneous action while the need is yet fresh.

This view is well stated by Judge Baldwin in an able and interesting article on International Congresses, published some time ago.

Speaking of the impulse towards social coordination, he said:

"This impulse will be felt as a cosmic force in precise proportion to the psychological contact of nation with nation. Until the days of steam transportation there were few in any country, even among its leaders, who ever went far from their own land. The seventeenth century had indeed established the practice of maintaining permanent legations for diplomatic intercourse; but it was an intercourse limited to official circles. Modern facilities for travel, modern uses of electricity, and the modern press have put the world, and even the embassy, on a different footing. There is no place left that is safe enough to hide State secrets. The telegraph and telephone have conquered time and space. The newspaper gives daily to every one for two cents what a hundred years ago all the governments in the world could not have commanded in a year.

¹ For the full text of Secretary Knox's proposal concerning the prize court and the enlargement of its jurisdiction by investing it with the jurisdiction and functions of a court of arbitral justice, see Supplement to this number of the JOURNAL, page 102, and for editorial comment upon the proposition, see this number, page 163.

"Nations have been brought together by material forces, starting into action greater immaterial forces. Electricity is finishing what steam began. Men come close together who breathe a common intellectual atmosphere; who are fed daily by the same currents of thought; who hear simultaneously of the same events; who are eager to disclose to each other whatever new thing, coming to the knowledge of any, is worthy the notice of all."

The disposition, then, to take concerted international action grows with the opportunity thus afforded by the marvelous modern development in the means of communication. Each nation instantaneously feels the compulsion of the public opinion of all nations. Compare, for example, modern exchanges of views between governments, swiftly reaching a common basis of action and resulting increasingly in ends beneficent to the whole world, with former ignorance and mutual suspicions largely due to ignorance, resulting in no common action and permitting aggressions and abuses by single nations or small groups which to-day the concert of all nations protests against more and more loudly and less and less tolerates.

Then, just as individuals and separate nations advance in the fruits of civilization and display in their conduct higher regard for honesty and justice and peace and less tolerance for wrong and oppression and cruelty, so these ideals of private and national conduct are manifestly inspiring all nations in their relations with each other. As nations understand each other better and the world draws closer together in the recognition of a common humanity and conscience, of common needs and purposes, there is carried into the international field the insistent demand for greater unity in enforcing everywhere the principles of a high morality and, by restraints mutually applied and observed, all the human ameliorations without which both national and international life would soon fall into anarchy and decadence.

This clear statement of the tendency toward international unity by a statesman holding responsible office will bring hope and encouragement to those who have long labored in private without recognition, and the announcement by Mr. Knox, as Secretary of State, that our Government not only approves the International Court of Prize, but seeks to invest it with the jurisdiction and functions of a court of arbitral justice in order that civilization may have a court in peace as well as in war, is evidence not merely of progress, but of the fact that international justice and the means by which it is to be promoted are the concern not merely of one nation but of the international community as a whole.

Many propositions have been made for the establishment of a permanent court of arbitration, but this is, as far as is known, the first instance of a statesman in office seriously proposing the establishment of such a tribunal and by so doing making its establishment a question of politics and a question of time.

UNVEILING OF THE MONUMENT COMMEMORATING THE FOUNDATION OF
THE UNIVERSAL POSTAL UNION

The Universal Postal Union, which has now existed for thirty-five years, is, among all international organizations, that which most intimately affects the everyday life of people the world over. Quietly this great unifying institution has been working without a numerous staff of officials and unattended by the pomp of state. Yet the entire world has become conscious of its influence, and it was therefore befitting that at the time when the twenty-fifth anniversary of the Union was celebrated at Berne, the proposal should have been made and adopted to erect an artistic monument in honor of this great international work. The monument is a gift of all the governments who are members of the Postal Union. The plan was selected by a committee after an international competition, in which M. René de Saint Marceaux of Paris was successful. His beautiful work was unveiled on October 4 last, with imposing ceremonies.

The monument is both highly imaginative and, while representative of the idea of postal communication, full of artistic beauty. On a ledge of rock, at the foot of which flows a small spring emptying into a pond in which the whole monument is mirrored, there is seated the graceful figure of a woman whose outstretched arm and hand rest upon the escutcheon of the town of Berne. Both to the right and left of this figure lie masses of rock. Upon the summit of the highest of these, the sculptor has modelled a cloud, upbearing a globe. Five genii, representing the different parts of the world, are floating about this sphere, handing letters to each other. The sculptor has overcome great difficulties. From the above description it might seem that the monument would be lacking in unity and that, moreover, the portrayal of so light a substance as clouds by means of stone could hardly be successful. And yet, all this is forgotten when the monument itself is in view. The sculptor has triumphed, although he himself does not describe his work as sculpture, but as a picture in granite and bronze.

A notable gathering of representatives of all the powers cast lustre upon the occasion. Nations were represented both by diplomats and by members of cabinet and administrative officials. Mr. Brutus J. Clay, the American Minister in Switzerland, represented the United States. At the dedication of the monument and at the banquet given by the town council of Berne, a number of notable speeches were made. The

feeling which animates these discourses shows how strong a hold the idea of international cooperation has taken upon representative men. The spirit of the occasion was perhaps best expressed by M. Deucher, President of the Swiss Confederation. Among other things, he said:

Gentlemen, the old Assembly House of the Bernese Diet bears this inscription: "It is in this building that the Universal Postal Union was founded on October 9th, 1874." To-day, thirty-five years later, there rises on one of the most beautiful sites of our Capital, the grand commemorative Monument, the unveiling of which we are met to celebrate.

The five genii which surround the globe represent the universal importance of the Union and attest the power gained by a great idea, for the realization of which nations went hand in hand, regardless of the difference of race, language and religion, political and economic interests—a triumph of civilization and culture, a bond of union between the nations. The Universal Postal Union, a work supremely pacific, constitutes a real confederation of the nations, the representatives of which to-day turn their eyes to the international monument and express their gratitude to the master who created it.

THE NORWAY-SWEDEN BOUNDARY ARBITRATION

On October 23, 1909, the Permanent Court of Arbitration at The Hague decided the boundary dispute between Norway and Sweden, by virtue of a convention between the two Powers dated March 14, 1908. The tribunal was to be and actually was composed of three members of whom one was a Norwegian (M. Beichmann), another a Swede (M. de Hammarskjöld), and the third or president, who, by the agreement was to be "neither a subject of either of the contracting parties nor domiciled in either of the two countries," M. Loeff of Holland.

The tribunal, consisting of three members, was not constituted according to the terms of article 24 of the Hague Convention of 1899, which contemplates that the judges chosen shall be members of the permanent panel. The arbitration was, however, under the auspices of the Permanent Court, as the parties in controversy availed themselves of the provisions of article 26:

The International Bureau at The Hague is authorized to place its premises and its staff at the disposal of the Signatory Powers for the operations of any special Board of Arbitration.

It may, therefore properly be called a decision of the Permanent Court at The Hague and, as such, both enhances the dignity and demonstrates again the usefulness of this institution.

The award of the tribunal deals with and settles the facts in controversy and only incidentally discusses or applies principles of international law, and its importance lies not so much in the decision as in the resort to arbitration for the settlement of an outstanding international difference.

In the matter of procedure it would seem that an innovation is to be noted, because the arbiters decided to visit and actually did visit the territory in dispute in order that they might by personal examination familiarize themselves with the territory in dispute and be the better prepared to understand and appreciate the arguments relating to the geography and topography of the region.

For the second time within a year the Permanent Court at The Hague has rendered a decision, and it is devoutly hoped that the resort to arbitration will become a habit and that a permanent court of arbitration will be the natural consequence of a frequent and confident resort to arbitration.¹

THE NOBEL PEACE AWARD

On December 9, 1909, the Committee for the Distribution of the Nobel Prizes announced that the peace prize had been divided between M. Beernaert of Belgium and the Baron d'Estournelles de Constant of France. The recipients are well-known and active workers in the cause of peace and richly deserve the honor accorded to them.

M. Auguste Beernaert, born in 1828, is a trained lawyer and statesman who has served his country through a long and honorable career as Minister of Public Works, Minister of Agriculture, Minister of Finance, President of the Chamber of Representatives, and Member of the Permanent Court of Arbitration. At the First Peace Conference he was president of the first commission, charged with the consideration of the limitation of armaments, and in the Second Conference he was president of the second commission, charged with the consideration of the laws and customs of land warfare. In both conferences his voice and influence were for the lessening of the hardships of warfare and for the peaceful settlement of international conflicts. A reference to any work on the conferences will show the nature and importance of his contributions, and it is no exaggeration to say that the Nobel Committee honored itself as well as M. Beernaert by its award.

¹ For the facts and the opinion and judgment of the court, see *Judicial Decisions* in this number, page 226.

Baron d'Estournelles de Constant, born in 1852, has been for many years a familiar figure in international conferences, and both at home and abroad has consistently represented the cause of peace. Trained for the diplomatic service (he is now minister plenipotentiary of the first class), after fifteen years' experience (1880-1895) he was elected member of the Chamber of Deputies and in 1905 was elected senator. He represented France at both of the Hague Conferences and is a Member of the Permanent Court of Arbitration. M. d'Estournelles is an influential member of the Inter-Parliamentary Union, an outspoken partisan of the limitation of armaments and president of the Society of International Conciliation which he organized and directs in order to promote good understanding and draw the nations closer together. He is himself the personification of conciliation, and in the best sense of the word, an agitator for the cause of peace. By birth a Frenchman, he is by choice a citizen of the world and would break down the barriers which separate nations. His remarkable address at Berlin was commented upon at length in the July number of the JOURNAL, and if Germany and France forget their past differences and cooperate in the peaceful development of the world, it will be due in no small measure to the devotion, foresight and generous sympathy of d'Estournelles. To a gentle and pleasing, not to say winning, personality, he has the gift of persuasive speech. He is a remarkable linguist and is thus in all ways admirably fitted for the rôle he has chosen, namely, a mediator between the nations.

THE ANNUAL MEETING

The Fourth Annual Meeting of the Society of International Law will be held in Washington April 28, 29 and 30, 1910. The experience of the past three years shows that the two days devoted to the presentation and discussion of papers have left little or no time for the meeting of the various committees for the consideration of the business of the Society. It has therefore been decided that the meeting shall open Thursday evening instead of Friday morning, and that the afternoon session of Friday shall be omitted, in order that the various committees may hold their business meetings.

It is expected that the opening session of the Society will be held in the Pan-American Building, and that the meetings of Friday and Saturday, as well as the annual banquet on Saturday evening, will take place in the New Willard Hotel as usual.

The attempt was made last year, with considerable success, to select interesting and timely subjects for discussion and to make the papers read as well as the discussions so valuable that the report of the Annual Proceedings would not only interest members of the Society, but be a contribution to the subjects discussed. Encouraged by the results of last year, the Society has selected the following subjects for discussion for the Friday session.

The basis of protection to citizens residing abroad, ranged under the following headings:

1. The question of the limitation of protection by contract between the citizen and a foreign government or by municipal legislation.
2. The citizenship of individuals, or of artificial persons (such as corporations, partnerships, etc.) for whom protection is invoked.
3. The question of domicile in its relation to protection.
4. The effect of the unfriendly act or inequitable conduct of the citizen upon the right to protection.
5. The place of denial of justice in the matter of protection.
6. Intervention for breach of contract for tort where the contract is broken by the state or the tort committed by the government or governmental agency.

Under question 3 it is suggested that the Thrasher and Koszta cases will throw light upon the nature and importance of the question of domicile, and under question 4 that the Arbuthnot and Ambrister case will indicate one phase of this difficult and complicated subject, and that the Delagoa Bay and El Triunfo cases will serve as an indication of the scope of question 6.

At the Third Annual Meeting the following resolution was adopted:

Resolved, That the President of the American Society of International Law shall appoint a committee of seven members, of which he shall be *ex officio* the chairman, to report to the annual meeting of this society in 1911 a draft codification of those principles of justice which should govern the intercourse of nations in times of peace; and make a preliminary report, if possible, in 1910, sufficiently in advance of the meeting to be a subject of discussion at the Fourth Annual Meeting.¹

On Saturday morning the Committee on Codification will present a preliminary report on the history of codification and on the scope and plan of codification under the resolution.

It is expected that the president of the Society, Honorable Elihu Root, will open the proceedings by an address which will, as previously

¹ Proceedings, 1909, page 268 note.

stated, occur on Thursday evening April 28th, in the Pan-American Building. The address will be followed by two papers of a general nature, the first of which will outline the advantages of the codification of international law and the second state the objections to the proposed codification. In this way Saturday morning can be devoted to the consideration of the report of the committee on the resolution without considering the general question of codification.

It is expected that the reception at the White House will be held on Saturday afternoon at two-thirty o'clock.

It is suggested that members intending to be present at the banquet should secure their tickets well in advance in order to aid the committee in making the necessary arrangements.

Any changes in the time of the meeting or in the programme will be duly notified to the members of the Society.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Arch. dipl.*, Archives diplomatiques, Paris; *B.*, boletín, bulletin, bollettino; *B. A. R.*, Monthly bulletin of the International Bureau of American Republics, Washington; *Doc. dipl.*, France: Documents diplomatiques; *Dr.*, droit, diritto, derecho; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain: Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *Mém. dipl.*, Mémorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *N. R. G.*, Nouveau recueil général de traités, Leipzig; *Q. dipl.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs-G.*, Reichs-Gesetzblatt, Berlin; *Staatsb.*, Staatsblad, Gröningen; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, the Times (London); *Treaty ser.*, Great Britain: Treaty Series.

March, 1909.

- 15 GERMANY—GREAT BRITAIN. Exchange of notes of February 22 and March 15 confirming protocols defining boundaries between British and German territories in Africa: (1) Gorege to Lake Chad (February 12, 1907); (2) Uba to Maio Tiel (March 11, 1907). *Treaty ser.*, 1909, No. 17.

July, 1909.

- 3 FRANCE—GREAT BRITAIN. Convention signed at Paris concerning compensation for accidents of work. *Mém. dipl.*, August 29; *London Ga.*, November 30.
- 3 SALVADOR—UNITED STATES. Exchange of ratifications at Washington of arbitration treaty signed at Washington December 21, 1908. Ratification advised by Senate January 6, 1909; ratified by the President March 1; by Salvador June 14; proclaimed July 7. *U. S. Treaty ser.*, No. 529; *B. A. R.*, September.
- 12 JAPAN—KOREA. New convention to ameliorate the judicial and penal administration in Korea. Signed by the Japanese Resident-General in Korea and the Prime Minister of Korea. *Mém. dipl.*, August 22.

July, 1909.

- 20 BELGIUM—NICARAGUA. Exchange at Guatemala of ratifications of arbitration treaty signed at Guatemala March 6, 1906. Text in *Mém. dipl.*, September 12; *B. Usuel*, September 2.
- 20 COSTA RICA—UNITED STATES. Exchange at Washington of ratifications of arbitration convention signed January 13, 1909. Proclaimed July 21. *La Gaceta*, August 4; *B. A. R.*, September; *U. S. Treaty ser.*, No. 530.
- 26 MEXICO. Accession to the arrangement of Madrid of April 14, 1891, concerning international registration of trade-marks becomes effective. *Monit.*, July 11; *B. A. R.*, October.
- 27 MEXICO—NICARAGUA. Exchange of ratifications, at Mexico City, of the parcels post convention approved by Mexican Senate October 23, 1907; ratified by President Diaz April 23, 1909; ratified by the Congress of Nicaragua February 6, 1908, and approved by President Zelaya July 27, 1909. It will continue in force till twelve months after either party notifies its intention to terminate it. *B. A. R.*, October.
- 28 GREAT BRITAIN. Conference on the Naval and Military Defence of the Empire, held at London July 28 to August 19. Representatives from the self-governing dominions: Canada, Australia, New Zealand, Cape Colony, Newfoundland, Natal, Transvaal, and Orange River Colony, met the Prime Minister and other officials. The conference was of a purely consultative character and was held in private at the Foreign Office. *Cd.*, 4948; *Times*, dates of meeting.
- 30 PARAGUAY—UNITED STATES. Paraguay approved the arbitration convention signed at Asuncion, March 13. *B. A. R.*, November.
- 30 BRAZIL—HONDURAS. Honduras approved treaty of arbitration negotiated in April, 1909. Terms published in *La Gaceta*, August 19, 1909. *B. A. R.*, November.
- 31 GERMANY—NETHERLANDS. Agreement signed at Berlin, supplementary to the convention concluded at The Hague on July 17, 1905, concerning civil procedure. In effect September 1, and continues till six months after denunciation. *Staatsb.*, 1909, No. 296.
- 31 SPAIN—FRANCE. Royal decree approving telegraph convention signed at Paris, June 29, *q. v.* *Gaceta de Madrid*, August 1.

August, 1909.

- 1 AUSTRIA—MEXICO. Special arrangement in force for exchange of money orders, including Austrian offices in the Levant. *L'Union Postale*, 34:203.
- 1 FOURTH LATIN-AMERICAN MEDICAL CONGRESS opened at Rio de Janeiro. At the same time the International Exposition of Hygiene was opened at the same place. Next meeting will be at Lima. *B. A. R.*, October; *Diario Oficial*, Mexico, October 18.
- 3 LUXEMBURG. Ratification of the International Convention relative to Civil Procedure, concluded at The Hague July 17, 1905. *Monit.*, August 25; *B. Usuel*, August 3.
- 3 TWENTIETH EUCHARISTIC CONGRESS opens at Cologne. *Mém. dipl.*, August 8.
- 6 BRAZIL. Decree declaring that the provisions of the Brazilian law of September 24, 1904, requiring the publication in the *Diario Oficial* of the certificate of registration and description of national and foreign trade-marks are inapplicable to trade-marks deposited at the International Bureau at Berne, under the Madrid convention of 1891. *B. A. R.*, November, 1909.
- 7 GREAT BRITAIN—UNITED STATES. Denunciation of the agreement of November 19, 1907, respecting (1) Commercial Travellers' Samples entering the United Kingdom; (2) Import Duties on British Works of Art entering the United States. Effective February 7, 1910. See *May 1, 1909. Treaty ser.*, 1909, No. 23.
- 10 BRAZIL—ECUADOR. Decree by President of Brazil approving the treaty signed at Rio de Janeiro May 10, 1907, on Commerce and River Navigation between these countries. *Diario Oficial* (Brazil), September 17, 1909.
- 11 COSTA RICA—MEXICO. The President of Costa Rica approved the postal convention signed June 29, 1909. Text in *La Gaceta*, San José, August 19, 1909.
- 12 FRANCE—SPAIN. Ratifications exchanged at Paris of declaration made at Bayonne, April 6, 1908, relative to fisheries in the Bidassoa. Decree August 19 putting it in force. *J. O.*, August 20; *Gaceta de Madrid*, August 21. This is a modification of the convention of February 18, 1886, and the additional protocol of January 19, 1888.
- 17 CHINA. Hankau-Szechuan Railway loan definitely settled at Peking. Loan to be increased to \$30,000,000 and British, French,

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German, and American groups each to take one-quarter. *Times*, August 18.

- 17 UNITED STATES—VENEZUELA. Decree of President Gomez approving protocol for settlement of certain claims, including that of A. F. Jaurett, signed at Caracas February 13, 1909. *Gaceta Oficial*, Caracas, September 8, 1909.
- 15-19 SECOND INTERNATIONAL SCIENTIFIC CONFERENCE ON LEPROSY held at Bergen. The report of the British delegates is embodied in *Cd.*, 4916; *Times*, October 29; *Mém. dipl.*, August 22. The first conference was held at Berlin, October 11-16, 1897.
- 20 FRANCE—MEXICO. In pursuance of a compromise signed at Mexico, March 2, 1909, these governments request the King of Italy to decide a question arising as to the sovereignty over Clipperton Island. *Mém. dipl.*, August 22.
- 21 UNITED STATES—VENEZUELA. Protocol of settlement of the claim of the United States and Venezuela Company ("Crichfield case") signed at Caracas. *U. S. Treaty ser.*, 531½.
- 10-23 SERBIA. Adherence to the additional act of Brussels of December 14, 1900, modifying the international convention signed at Paris March 20, 1883, for the protection of industrial property. *J. O.*, September 21.
- 23 FIFTH INTERNATIONAL DENTAL CONGRESS opened at Berlin. The former congresses met (1) at Paris in 1889; (2) at Chicago in 1893; (3) at Paris in 1900; (4) at St. Louis in 1904. *Times*, August 24.
- 27 PERU. Decree fixing January 1, 1910, as the date for the reception in Peruvian consulates abroad of applications for the registry of trade-marks, to meet the needs of companies who desire protection but have no representatives at Lima. *B. A. R.*, November.
- 27-28 FOURTH INTERNATIONAL CONGRESS OF THE MEDICAL PRESS met at Vienna. *Mém. dipl.*, September 5. The earlier congresses met (1) at Paris, 1900; (2) at Madrid, 1903; (3) at Lisbon, 1906. A special international conference growing out of the first congress met at Monaco in 1902. *Annuaire de la Vie Int.*, 1908-1909.
- 29 SIXTEENTH INTERNATIONAL MEDICAL CONGRESS opened at Budapest. Closed September 4. Next congress meets at London, 1913. *Times*, September 1; *Mém. dipl.*, September 5. Former con-

August, 1909.

- gresses as follows: (1) Paris, 1867; (2) Florence, 1869; (3) Vienna, 1873; (4) Brussels, 1875; (5) Geneva, 1877; (6) Amsterdam, 1879; (7) London, 1881; (8) Copenhagen, 1884; (9) Washington, 1887; (10) Berlin, 1890; (11) Rome, 1894; (12) Moscow, 1897; (13) Paris, 1900; (14) Madrid, 1903; (15) Lisbon, 1906. *Annuaire de la Vie Int.*, 1908-1909.
- 30 SIXTH INTERNATIONAL CONGRESS OF TRADE UNIONS opened. *Times*, August 31.
- 30 BELGIUM—HONDURAS. Ratification by Belgium of the convention of January 1, 1909, relative to exchange of packages by post. *B. Usuel*, August 30.
- 31 GERMANY—VENEZUELA. Treaty of Amity, Commerce, and Navigation signed at Caracas January 26, 1909, was promulgated by President of Venezuela. (See January 25.) Treaty to last ten years and thereafter unless previous notification is given by one of the contracting parties. *B. A. R.*, November, 1909.

September, 1909.

- 1 PERSIA. A proclamation was issued granting a general amnesty, with certain exceptions. *Times*, September 2.
- 3 BRAZIL—SALVADOR. Treaty of arbitration signed. Terms identical with those of treaties already signed by Brazil and Honduras, Nicaragua, and Costa Rica. *B. A. R.*, November, 1909.
- 4 CHINA—JAPAN. Convention dealing with Chientao and five other questions regarding Manchuria signed at Peking. *Q. dipl.*, 13:376; *Times*, September 6 and 9 (full text); *Mém. dipl.*
- 4 BRAZIL—PERU. Decree by President of Brazil approving the accord regarding the navigation of the Japura or Caqueta river, concluded at Lima April 15, 1908. *Diario Oficial* (Brazil), September 17.
- 5-11 FIFTH INTERNATIONAL ESPERANTO CONGRESS held its sessions at Barcelona. The first congress met at Boulogne, 1905; the second at Geneva, 1906; the third at Cambridge, England, 1907; the fourth at Dresden, 1908. The sixth will meet at Washington the third week in August, 1910. *N. A. Rev.*, 190:693.
- 6 MEXICO. Adherence to the arrangement and protocol signed at Madrid, April 14, 1891, for the protection of industrial property.
- 8 THE BALTIC AND WHITE SEA CONFERENCE met at The Hague. *Times*, September 10. Next year's meeting will be at Christiania.

September, 1909.

- 8 GREAT BRITAIN—UNITED STATES. Agreement effected by exchange of notes signed at London, July 22–September 8, renewing the *modus vivendi* of 1908 regarding the Newfoundland fisheries, and continuing it pending settlement of the Atlantic fisheries questions by the Hague tribunal. *U. S. Treaty ser.*, No. 533.
- 8 BRAZIL—PERU. Treaty concluded at Rio de Janeiro between these powers settles the question of their frontiers in the Amazon region. Each retains its present possessions from headwaters of the Javary to parallel 11° south. *Times*, September 10.
- 9 UNITED STATES—VENEZUELA. Protocol of arrangement for settlement of the cases of the Orinoco Corporation (and its predecessors in interest, the Manoa Company Limited, the Orinoco Company, and the Orinoco Company Limited) signed at Caracas. Text of protocol and of notes exchanged in *Gaceta Oficial* (Caracas), September 16. *U. S. Treaty ser.*, No. 533½.
- 11 EGYPT—RUSSIA. Emperor of Russia ratifies the treaty of commerce and maritime navigation. *Mém. dipl.*, September 19.
- 11 INTERNATIONAL HORSE SHOW opened at San Sebastian, Spain. Entries include delegations from the armies of Argentine, Belgium, England, France, Italy, Portugal, and Spain. *Times*, September 13.
- 13 GREAT BRITAIN—PORTUGAL. Additional articles to the agreement of January 17, 1883, for the exchange of money orders, signed at Lisbon. Text in *Treaty ser.*, 1909, No. 26.
- 13 THE MACEDONIAN FINANCIAL COMMISSION held its last sitting at Salonika. For account of its origin and of the work done, see *Times*, October 1, 1909.
- 13–15 SECOND YOUNG EGYPT CONGRESS opened at Geneva, on the 27th anniversary of occupation of Egypt by Great Britain. *Times*, September 14; *Mém. dipl.*, September 19, October 7 and 14.
- 14 SEVENTH CONGRESS OF CHAMBERS OF COMMERCE OF THE EMPIRE opened at Sydney, New South Wales. The fourth congress met at London, 1900; the fifth at Montreal, 1903; the sixth at London, 1906. The principal action was a resolution in favor of a preferential system of trade within the Empire. Congress closed September 17. *Times*, September 14, 20, 27.
- 18 INTERNATIONAL CONGRESS OF AERONAUTICS opened at Nancy, seven day session. *Mém. dipl.*, September 12.

September, 1909.

- 18 NICARAGUA—UNITED STATES. Protocol of settlement of the George D. Emery Company's claim, signed at Washington. The protocol of agreement for the arbitration of the case and a supplementary protocol were signed at Washington May 25.
- 20-23 DENMARK—MEXICO. Decree of President Diaz approving convention signed May 26, 1909, at Mexico providing for exchange of parcels post between Mexico and the Danish West Indies. Text in *Diario Oficial* (Mexico), September 28.
- 20 INTERNATIONAL CONFERENCE OF THE PRESS opened in London. The first congress was held at Anvers in 1894. The 1908 meeting was at Berlin. *Times*, September 22.
- 21 INTERNATIONAL GEODETIC ASSOCIATION opened its 18th triennial conference at London and Cambridge. It was established in 1862 at Berlin. *Times*, September 22.
- 22 TURKEY. The Porte addresses a memorandum to the Powers requesting their consent to the raising of the import duties from 11% to 15%. *Times*, September 23.
- 22-26 INTERNATIONAL MARITIME COMMITTEE met at Bremen. *Mém. dipl.*, September 26; *Times*, September 28. For the relation of this conference to the Brussels Conference of September 28 (*q. v.*), see *Times*, October 29.
- 28 THIRD INTERNATIONAL MARITIME LAW CONFERENCE opened at Brussels. Closed October 8. *Vide, supra*, September 22-26. *Times*, October 29.

October, 1909.

- 1 MEXICO—UNITED STATES. Postal Money-Order Convention concluded at Washington, February 2, 1909, became effective. It was approved by the Mexican Congress on May 3 and ratified by President Diaz on June 26. It will continue in force until one year after either country shall have notified the other of its intention to terminate it. *B. A. R.*, October; *L'Union Postal*, 34:204.
- 2 PARAGUAY—UNITED STATES. Ratifications exchanged at Asuncion of arbitration convention signed at Asuncion March 13. Ratifications advised by Senate July 30; ratified by the President August 10; by Paraguay September 28; proclaimed November 11. *U. S. Treaty ser.*, No. 534.

October, 1909.

- 3 FRANCE—PORTUGAL. Telegraph Convention signed at Lisbon, July 11, 1908, ratified and confirmed by the King of Portugal. Applies to French and Portuguese Congo. *Diario do Governo*, November 10.
- 4 GREAT BRITAIN—UNITED STATES. North Atlantic fisheries dispute. The Cases were exchanged this date. Counter-cases to be exchanged four months later. The entire matter to go to The Hague Court two months thereafter. See *January 27, 1909. Times*, October 6.
- 4 UNIVERSAL POSTAL UNION. Monument unveiled at Berne commemorating the twenty-fifth anniversary of the foundation of the Union. *L'Union postale*, 34:161.
- 5 DIPLOMATIC CONFERENCE RELATIVE TO THE INTERNATIONAL CIRCULATION OF AUTOMOBILES held at Paris October 5 to 11. See *October 11*.
- 8 INTERNATIONAL. President of Brazil approves the convention concluded at Rio de Janeiro, August 23, 1906, between Brazil, Ecuador, Paraguay, Bolivia, Colombia, Honduras, Panama, Cuba, Peru, Salvador, Costa Rica, Mexico, Guatemala, Uruguay, Argentine, United States of America, and Chile, fixing the status of naturalized citizens who renew their residence in the country of their origin. *Diario Oficial* (Brazil), October 14, 1909.
- 8 INTERNATIONAL PEACE CONGRESS opened at Brussels. *Mém. dipl.*, October 10 and 17. It was to have met in September at Stockholm but was postponed on account of the general strike in Sweden. The next congress will meet at Stockholm.
- 8 GERMANY—GREAT BRITAIN. Exchange of notes, August 31 and October 8, providing for the mutual protection of British and German trade-marks in Corea. *Treaty ser.*, 1909, No. 25.
- 8 BRAZIL—UNITED STATES. Decree of President of Brazil approving the convention signed April 27, 1908, at Rio de Janeiro, regulating the status of naturalized citizens who renew their residence in the country of their origin. *Diario Oficial* (Brazil), October 14, 1909.
- 10 INTERNATIONAL MILITARY STEEPLE CHASE AT BRUSSELS opened. *J. O.*, September 26.
- 10 SERBIA. Accession to the Industrial Property Convention of March 20, 1883, as modified by the additional act of December 14, 1900, takes effect. *Treaty ser.*, 1909, No. 24; *Mém. dipl.*, September 26.

October, 1909.

- 11 INTERNATIONAL CONVENTION RELATIVE TO THE CIRCULATION OF AUTOMOBILES signed at Paris by representatives from Germany, Belgium, Spain, France, Italy, Monaco, Roumania, and Servia. See October 5. *American Chamber of Commerce in Paris, B. No. 78.*
- 11 CHINA—JAPAN. Pratas Island dispute settled by agreement signed by Japanese Consul at Canton and the Chinese Commissioners. China's sovereignty over the island recognized. *Times*, October 12.
- 12 CANADA—MEXICO. Parcel post convention signed in Mexico City, May 4, 1909, became effective. Full text in *Diario Oficial of Mexico*, July 12. It will continue in force till six months after either party gives notification of intention to terminate it. *B. A. R.*, October.
- 14 CHINA. Meeting of the new provincial assemblies. In September, 1905, an Imperial commission was appointed to study "political conditions and governmental policies in other countries." August 27, 1906, an Imperial committee was appointed to examine and report on the material presented by the commission. On September 1, 1906, an Imperial decree proclaimed various reforms and promised that "in a few years' time constitutional government would be inaugurated." Another edict, February 18, 1907, stated that "a constitution and a parliament will be granted to the country." On September 20, 1907, the Empress ordered the establishment of an Assembly of Ministers to prepare the foundations of constitutional government. On October 19, 1907, it was declared that besides the Imperial Assembly of Ministers at Peking, provincial assemblies were to be formed in provincial capitals. Regulations therefor were published in the *Official Gazette*, July 22, 1908, as also for prefectural and district assemblies. August 27, the memorial and edict on constitutional government were issued setting forth the general principles of the constitutional system and the steps to be taken leading up to the summoning of a parliament in 1917. *Times*, October 15.
- 17 FIRST INTERNATIONAL CONGRESS FOR THE CONSERVATION OF LANDSCAPES opened at Paris. *Mém. dipl.*, October 24.
- 20 BRAZIL—COSTA RICA. Arbitration convention, signed at Washington, May 18, approved by Congress of Costa Rica, October 11, was signed by the President of Costa Rica. *Official Gazette*, San José, October 24; *B. A. R.*, December.

October, 1909.

- 17-24 SECOND INTERNATIONAL CONGRESS FOR THE REPRESSION OF ADULTERATION OF ALIMENTARY AND PHARMACEUTICAL PRODUCTS, at Paris. The Universal Society of the White Cross, organized at Geneva, August 22, 1907, arranged for four meetings of this congress. The first was held at Geneva, September 8-12, 1908, and the third and fourth will be held in 1910 and 1911, respectively. *Mém. dipl.*, October 24, and November 28.
- 21 COSTA RICA—MEXICO. Decree by President Diaz approving the convention signed June 21, at Mexico, and August 11, at San José, to establish a parcels post between the two countries. Text in *Diario Oficial* (Mexico), October 27.
- 23 NORWAY—SWEDEN. Award handed down by the Hague Court of Arbitration in the maritime boundary case. Sweden gets the Grisbadarna Islands, important as fishing centers, while Norway receives Skjoette Grund. *Times*, October 25. See *Judicial Decisions*, page 226, this Journal.
- 25 BOLIVIA—PERU. Boundary difficulty. On September 15 an agreement was reached based on the decision of President Alcantara of Argentine Republic. The protocols were ratified by Peru on October 24 and by Bolivia on October 25. *Mém. dipl.*, October 31; *Am. R. of R.*, 40:411; *Geographical J.*, 34:573; *R. Generale du Dr. Int. Public*, 16:368; *Renault: Le differend entre la Bolivie et la Perou et l'arbitrage international*.
- 26 PORTUGAL. Law forbidding fishing by foreign vessels within the three-mile limit off the coasts of Portugal, the Azores, and Madeira, and setting the fine for violation of the law at from \$10.00 to \$50.00. *Diario do Governo*.
- 30 BRAZIL—URUGUAY. Treaty rectifying boundary on the Jaguarao River and Lake Merim. Not signed till November 6. Text in *Diario Oficial*, (Brazil) November 10.
- 31 FRANCE—UNITED STATES. Commercial convention terminated. Decree by President of France, August 20 (*J. O.*, August 27), abrogating from November 1 the provisions of the decrees of July 7, 1893, May 8, 1898, and February 21, 1903, so far as they apply to products of the United States and Porto Rico. *Tariff Series*, No. 6 D, *Department of Commerce and Labor*; *Q. dipl.*, 13:368; *Mém. dipl.*, August 29.

OTIS G. STANTON.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

UNITED STATES ¹

Acts of Congress, treaties, proclamations, decisions of the Supreme Court, and Opinions of the Attorney-general relating to noncontiguous territory, Cuba and Santo Domingo and to military affairs, 1898-1909. xxxii., 442 p. *Bureau of insular affairs*. (S. Doc. 47.)

Naturalization laws and regulations, August 17, 1909. 28 p. *Bureau of Immigration and Naturalization*.

Pan-American Scientific Congress, Report of the delegates of the United States to the, Santiago, Chile, December 25, 1908-January 5, 1909. 65 p. *Dept. of State*.

Sanitary convention between the United States and other Powers, signed at Washington, October 14, 1905, proclaimed March 1, 1909. 27 p. *Dept. of State*. (Treaty series 518.)

GREAT BRITAIN ²

Arbitration, Return showing all general treaties of, between the United Kingdom and other states. *Foreign office*. (cd. 4870.) $\frac{1}{2}$ d.

Belgian nationality, Copy of the Belgian law of June 8, 1909, relative to, *Foreign office*. (cd. 4730.) 1d.

Fisheries on the North Atlantic coast, Agreement between the United Kingdom and the United States for the submission to arbitration of questions relating to, signed at Washington, 27th January, 1909. *Foreign office*. (cd. 4815.) 1d.

International office of public health, Accession of Mexico and Sweden to the international agreement of December 9, 1907, respecting the creation of an, 1909. *Foreign office*. (cd. 4817.) $\frac{1}{2}$ d.

Persia, Further correspondence respecting the affairs of. 1909. *Foreign office*. (cd. 4733.) 1s. 3d.

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PHILIP DE WITT PHAIB.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

THE SCHOONER "ENDEAVOR"¹

Court of Claims of the United States

February 1, 1909

The schooner *Endeavor*, whereof Nathaniel Griffin was then master, being an armed vessel carrying a commission issued by the President of the United States under the act of July 9, 1798 (1 Stat. L., 578), sailed on a return commercial voyage from Demerara on the 11th day of October, 1799, bound to Boston, stopping en route at several of the West Indian islands. While peacefully pursuing said voyage, on the 6th day of November, 1799, she was seized by the French privateer *Victor*, Captain Mace, after resistance to visitation and search, and combat, and ordered to Porto Rico. * * * After leaving the privateer, and while on her way to Porto Rico, the *Endeavor* was retaken by an English frigate, whose commander, under a claim of salvage, took out part of her cargo at sea and gave up said vessel to her mate, together with two men to help navigate her to Boston. On November 15 the *Endeavor* was again taken by the French, who put on board five men and ordered her to Porto Rico, where she arrived on the 18th of said month, where the mate was imprisoned without money or friends. Both said captures and the recapture were while the *Endeavor* was sailing on the same voyage.

Subsequently the *Endeavor* and her cargo were condemned as good prize for the benefit of the owners and crew of the *Alliance* by decree of the tribunal of commerce and prizes sitting at Basse-Terre in the island of Guadeloupe, January 7, 1800, and thereby became a total loss to the owners thereof.

The claims of the owners were not embraced in the convention between the United States and the Republic of France, concluded on the 30th of April, 1803. They were not claims growing out of the acts of France,

¹ This is one of the cases coming under the head of "French spoliations."

allowed and paid in whole or in part under the provisions of the treaty between the United States and Spain, concluded on the 22nd of February, 1819, and were not allowed, in whole or in part, under the provisions of the treaty between the United States and France, of the 4th of July, 1831.

PEELLE, *Ch. J.*, delivered the opinion of the court:

The question of law presented arises on the claimants' motion for a new trial, assigning as ground therefor, error of the court in its conclusion on the facts found, that the claimants were not entitled to indemnity.

The findings originally filed are withdrawn and the new findings, as above set forth, are now filed with this opinion.

The question as stated by the claimant is:

Did the resistance of an American merchantman, between the years 1798 and 1800, to search by the crew of an armed ship flying the French flag, raise a conclusive presumption of her guilt as a carrier of contraband of war for Great Britain, the enemy of France?

The question, though revived by able argument, is not a new one, and has heretofore been considered by this court, but we will review the authorities and further consider the question.

In the case of *The Nancy*, 27 C. Cls. R., 99, the vessel sailed from Baltimore in 1797 and was captured by an English ship and sent to St. Nicholas Mole, from which port the master was ordered not to depart without a convoy. Afterwards *The Nancy* sailed under the escort of an English privateer for Jeremie and on her return to the Mole under escort was captured by a French privateer, in respect to which the court said:

The question whether a neutral vessel laden with a neutral cargo is liable to condemnation if captured under enemy convoy has never been directly determined; but on a review of the cases and elementary writers, it is now held that if captured when actually and voluntarily under the protection of an enemy she is liable.

Had *The Nancy* been sailing under the convoy of an American vessel of war she might not have been subject to visitation, *Hall's Int. L.*, sec. 272; but that question was not before the court, as the vessel had sailed under the convoy of an English vessel, which was of course for protection against seizure by France and necessarily against the right of search. *The Nancy* had associated herself with a hostile force, and upon that she relied for protection and was, therefore, *pro hac vice* to

be considered as an enemy. *The Fanny*, 1 *Dodson*, 448; *Hall's Int. L.*, sec. 275.

The question of resistance to search was first considered by this court in the case of *The Ship Rose*, 36 *C. Cls. R.*, 290, 297. The *Rose* was armed, and her captain bore a commission from the President authorizing him to capture French armed vessels. On her voyage she encountered a French armed cruiser, and the two engaged in action for two and one-half hours, the *Rose* losing her mate and two men, and 14 wounded, while the French cruiser lost 25 killed and 21 wounded, though the *Rose* was captured and taken into Guadaloupe, where she was condemned as good prize on the ground of said commission, by virtue of which it was decreed that "said vessel not only did not obey the summons of the French privateer, but attacked it and defended himself until he was subdued by force of arms." By reason of said resistance, this court held that the vessel was lawfully condemned, and the claimants therefore were not entitled to indemnity, although no contraband was aboard.

That case was followed by the case of *The Ship Amazon*, 36 *C. Cls. R.*, 378, 391. The *Amazon* was also an armed vessel and resisted search, and for that reason the claimants were held not entitled to indemnity.

In the case of *The Schooner Jane*, 37 *C. Cls. R.*, 24, 30, the American vessel was armed and bore a commission and resisted visitation by flight from an unknown vessel until it was discovered to be a French privateer, when she hove to and was fired upon, which fire she returned and was subsequently captured, and her acts were held resistance to search justifying her condemnation.

In the case of *The Schooner Mary*, 37 *C. Cls. R.*, 33, 37, the vessel had been seized by a French privateer, but on the following day her master and crew overpowered the captors and carried her into Tortola, where the master, being unable to put to sea for want of sufficient crew, sold the vessel and cargo at a sacrifice, and the owners sought indemnity for their loss. It was held that the rescue of the vessel by her master and crew was unlawful, as the right to search a neutral vessel carried with it the correlative duty of submitting to search. *The Catherine Elizabeth*, 5 *C. Rob.*, 232; *The Dispatch*, 3 *C. Rob.*, 278, and note.

Such have been the decisions of this court, founded, as we believe, upon sound principles of international law, as announced both by text writers and by courts. That is to say, the court recognized the rule that "to enforce the rights of belligerent nations against the delin-

quencies of neutrals" they may in self-preservation exercise the right of visit and search. The right is "founded upon necessity, and is strictly and exclusively a war right, and does not rightfully exist in time of peace, unless conferred by treaty." 1 *Kent Com.*, p. 153 et seq.

The right to visit and search a merchant vessel upon the high seas, whatever be her cargo and wherever bound, is an incontestable right belonging to the lawfully commissioned cruisers of a belligerent. On the other hand, where a vessel and cargo when examined prove to be neutral — i. e., in no way transgress the rights of a belligerent by way of resistance or otherwise — the right of search is exhausted and the vessel must be permitted to proceed. *Sec. 526 Wheaton's International Law.*

The right of visitation and search negatives the idea of resistance, and hence resistance by the master of a vessel — except in case of extreme violence threatened by a cruiser abusing his commission — would be unlawful. 1 *Kent Com.*, *supra*.

As is said by Hall on International Law, section 275:

The right of capture on the ground of resistance to visit, and that of subsequent confiscation, flow necessarily from the lawfulness of visit, and give rise to no question. If the belligerent when visiting is in the rights possessed by a state in amity with the country to which the neutral ship belongs, the neutral master is guilty of an unprovoked aggression in using force to prevent the visit from being accomplished, and the belligerent may consequently treat him as an enemy and confiscate his ship.

The only point arising out of this cause of seizure which requires to be noticed is the effect of resistance upon cargo when made by the master of the vessel, or upon vessel and cargo together when made by the officer commanding a convoy. The English and American courts, which alone seem to have had an opportunity of deciding in the matter, are agreed in looking upon the resistance of a neutral master as involving goods in the fate of the vessel in which they are loaded, and of an officer in charge as condemning the whole property placed under his protection. "I stand with confidence," said Lord Stowell, "upon all principles of reason, upon the distinct authority of Vattel upon the institutes of other great maritime countries, as well as those of our own country, when I venture to lay it down that, by the law of nations, as now understood, a deliberate and continued resistance to search, on the part of a neutral vessel, to a lawful cruiser, is followed by the legal consequences of confiscation." *Sec. 526, Wheaton's International Law.*

See the case of *The Maria*, 1 *C. Rob.*, 340, 377; *The Elzabe*, 4 *C. Rob.*, 409.

The court is now asked by the claimant to reverse its ruling above announced on the ground that the capture of American vessels from

1796 to 1800 by French privateers during the war between France and England were in the nature of reprisals.

The case was argued with great force and learning, counsel reviewing the history of the times from 1754, when Washington, kindling "the first great war of revolution," fought the battle of Great Meadows, down through our Revolutionary period and the war between England and France, which culminated with Waterloo in 1815. Reference was made to the struggle of the colonies with Great Britain and the alliance with France by the treaty of 1778, which latter, he says, was abandoned by the United States in their treaty with Great Britain in 1795; that the losses to France by reason of the treaty of 1795 caused, if *they* did not justify, France in adopting the policy of seizing American merchantmen on the high seas by way of reprisal.

In respect to the defense of resistance to search the claimant says:

Throughout this litigation it appears to have been assumed that the relations of America toward France during this period from 1796 to 1800 were solely those of a neutral toward a belligerent, and that if America suffered injury from France it was because France abused her belligerent rights. * * * The fallacy of the contention of the government lies in the proposition which is implied in every argument, that nations must either be at war or at peace, and that if America was not at war with France she must have been at peace with France, and therefore had no right to resist the French claim as a belligerent to search for contraband of war in American ships.

Setting aside for the moment the legal limitations of the right of search and the manner in which France disregarded these limitations, I submit that it is a fundamental misconception of law to assume that nations must be at war or absolutely at peace. There is a perfectly recognized and well-established intermediate condition known as a condition of reprisals, which is subject to its own code. This condition of reprisals arises when a nation which conceives itself to be wronged by another proceeds to redress its own injuries by seizures. Necessarily, differences arise which lead to armed collisions. The relations between the two states then become equivocal. If war follow, then the declaration of war is held to be a declaration of animus from the outset, and all claims for damages are merged in one general loss by war. If, on the contrary, the reprisals be terminated by a reconciliation, then the peaceful animus relates back, and mutual compensation for loss is provided for. This was the doctrine laid down by Lord Stowell in the *Boedes Lust*, 5 *C. Robinson*, 233. It is also the theory of general international law as expounded by Wheaton, who has thus described reprisals:

"Among the various modes of terminating the differences between nations, by forcible means short of actual war, are the following:

* * * * *

"4. By making reprisals upon the persons and things belonging to the offending nation, until a satisfactory reparation is made for the alleged injury.

* * * * *

"General reprisals are 'when a state which has received, or supposes it has received, an injury from another nation, delivers commissions to its officers and subjects to take the persons and property belonging to the other nation wherever the same may be found.'

* * * * *

"The effects thus seized are preserved, while there is any hope of obtaining satisfaction or justice. * * * If the two nations upon this ground of quarrel come to an open rupture, satisfaction is considered as refused from the moment that war is declared, or hostilities commenced; and then, also, the effects seized may be confiscated." *Elements of International Law*, Wheaton, §§ 290, 291, 292. *The Boedes Lust*, 5 C. Robinson, 246.

To justify reprisals some specific wrong must be committed and the seizure must be made by way of compensation in value for such wrong. In other words, as a means of satisfaction without resort to actual war letters of marque are, or were formerly, issued by the state to certain of her citizens authorizing them to seize and take the person and property of the citizens of the offending state wherever found. But such reprisals when thus made will not become complete, justifying confiscation, until after hope of satisfaction has ceased or actual war has begun. *Vattel*, book 2, section 342 et seq.

In adjusting the claims under the act of our jurisdiction we must consider the questions in their relation to the actual state of facts existing at the time the losses occurred and as they were subsequently considered and determined by France and the United States by their treaty of September 30, 1800.

While reprisals are acts of war in fact, it is for the state affected to determine for itself whether the relation of actual war was intended by them; and if it so elects to regard such acts then the property so seized becomes liable to confiscation at once; otherwise it is to be held until hope of satisfaction has ceased.

As a matter of fact, however, neither France nor the United States treated the captures by French privateers as reprisals looking to indemnity for wrongs committed by the United States, but were, so far as we are advised, made upon the theory that American vessels were carrying contraband to aid England in her war with France, or were violating some treaty obligation between the United States and France or some regulation of the French government against carrying English

goods or from entering English ports. Nowhere was it claimed that France was authorizing privateers to prey upon American commerce because of rights under the treaty of 1778, of which she was deprived by the Jay treaty of 1795. On the contrary, almost invariably upon the capture of an American vessel the captor would at once take the property in and have it condemned as good prize by a French prize court, followed by an order for the sale of the property and the appropriation of the proceeds.

Referring to the treaties of 1778 the court, in the case of *Gray*, 21 *C. Cls. R.*, 343, 350, said:

The treaties of 1778 were two in number; that of "alliance," the one of most immediate, and, in fact, at that time of absolutely vital importance to the United States; and that of "amity and commerce." While separate instruments, they were concluded upon the same day, were the result of the same negotiations, signed by the same plenipotentiaries, and are, in diplomatic effect, one instrument. The treaty of alliance, after referring to its companion, the treaty of commerce, states that the two powers "have thought it necessary to take into consideration the means of strengthening the engagements therein made," and of "rendering them useful to the safety and tranquillity of the two parties; particularly in case Great Britain, in resentment of that connection, * * * should break the peace with France, either by direct hostilities or by hindering her commerce and navigation in a manner contrary to the rights of nations and the peace subsisting between the two Crowns;" and the two powers, resolving in such case to join against the common enemy, determined upon the treaty, which provided that if war should break out between France and Great Britain during the war for American independence, each party should aid the other according to the exigencies, as good and faithful allies; that the essential end of the alliance, called a "defensive" alliance, was the "liberty, sovereignty, and independence, absolute and unlimited, of the United States."

* * * * *

The provisions of the other agreement, the treaty of commerce, of importance in this case (alluding to them briefly) required protection of merchantmen; required ships of war or privateers of the one party to do no injury to the other; and provided especial, purely exceptional, and exclusive privileges by each party to the other as to ships of war and privateers bringing prizes into port.

The treaty of alliance was not one-sided, for it imposed upon the United States a possible duty and burden in the fulfillment of the guarantee of French possessions in America "forever" against all other powers. This issue was presented without delay. The French revolution began; in 1793 the King was beheaded, when France was instantly brought face to face with the powers of Europe, and her possessions in America were soon wrested from her.

Under the authority of that treaty France claimed the right to and actually did commission such persons in the United States as would

fit out cruisers in our ports to prey upon English commerce, thereby attempting to usurp the sovereign power of the United States. *Gray's Case*, 21 C. Cls. R., 353. By the decrees of May 9, 1793, and November 18, 1794, referred to in that case, France directed the seizure of neutral vessels, although the treaty of 1778 expressly provided that "free ships make free goods."

Thus American vessels were seized while the treaty of 1778 was in full force; and after the treaty of 1795 and the act of July 7, *supra*, abrogating the treaty of 1778, seizures were continued practically on the same ground as before. Indeed, France continued to regard the treaty of 1778 in full force, *Schooner John*, 22 C. Cls. R., 408, 456, and one of the grounds assigned for the condemnation of the vessel in the present case is for a violation of that treaty respecting the rôle d'équipage, so that such seizures can not be said to have been made by way of reprisals to indemnify France for any losses she may have sustained by the modification or abrogation of the treaty of 1778. On the contrary, France abrogated so much of the treaty of 1778 as related to contraband goods on neutral vessels; and while such abrogation justified French cruisers in seizing and her own courts in condemning vessels, such course did not abrogate any treaty right of the United States, as was held by this court in the case of the *Ship James and William*, 37 C. Cls. R., 303. This act of France was followed by the act of July 7, 1798, 1 Stat. L., 578, wherein Congress abrogated the treaty of 1778 *in toto*, thereby relieving France from all obligation under it.

And two days later Congress passed the act of July 9, 1798, 1 Stat. L., 578, entitled "An act to protect the commerce of the United States," by the first section of which the President was authorized to instruct the commanders of public armed vessels in the employ of the United States to subdue, seize, and take any armed French vessel which shall be found within the jurisdictional limits of the United States, or elsewhere on the high seas, and such captured vessel, with her apparel, guns, and appurtenances, and the goods or effects which shall be found on board the same, being French property, shall be brought within some port of the United States, and shall be duly proceeded against and condemned as forfeited, and shall accrue and be distributed as by law is or shall be provided respecting the captures which shall be made by the public armed vessels of the United States.

By section 2 of the same act the President was authorized to grant to the owners of private armed ships and vessels of the United States, who shall make application therefor, special commissions in the form which he

shall direct; and under the seal of the United States; and such private armed vessels, when duly commissioned, as aforesaid, shall have the same license and authority for the subduing, seizing, and capturing any armed French vessel, and for the recapture of the vessels, goods, and effects of the people of the United States, as the public armed vessels of the United States may by law have; and shall be, in like manner, subject to such instructions as shall be ordered by the President of the United States, for the regulation of their conduct.

And by section 5 provision was made for the forfeiture and condemnation of such armed French vessels and the distribution of the proceeds arising from the sale thereof among the captors as they may have agreed; or if there be no such agreement then the distribution to be made within the discretion of the prize court.

In the case of *Bas v. Tingy*, 4 Dall., 37, 41, the judges, in commenting on the foregoing statutes, as well as other statutes referred to by them, respecting the relations of the United States to France, held that a state of hostility did exist between the United States and France and that France was properly designated in the act of Congress to which they refer, *March 2, 1799, 1 Stat. L., 709, 716*, as an *enemy*, Mr. Justice Washington saying:

Now, if this be the true definition of war let us see what was the situation of the United States in relation to France. In March, 1799, Congress had raised an army; stopped all intercourse with France; dissolved our treaty; built and equipped ships of war and commissioned private armed ships; enjoined the former and authorizing the latter to defend themselves against the armed ships of France, to attack them on the high seas, to subdue and take them as prizes, and to recapture armed vessels found in their possession. Here, then, let us ask what were the technical characters of an American and French armed vessel combating on the high seas, with a view the one to subdue the other and to make prize of his property? They certainly were not friends, because there was a contention by force, nor were they private enemies, because the contention was external and authorized by the legitimate authority of the two governments. If they were not our enemies I know not what constitutes an enemy.

In respect to the same subject, Mr. Justice Chase, in the case last cited, page 43, said:

What, then, is the nature of the contest subsisting between America and France? In my judgment, it is a limited, partial, war. Congress has not declared war in general terms; but Congress has authorized hostilities on the high seas by certain persons in certain cases. There is no authority given to commit hostilities on land; to capture unarmed French vessels, nor even to capture French armed vessels lying in a French port; and the authority is not given, indiscriminately, to every citizen of America against every citizen of France,

but only to citizens appointed by commissions or exposed to immediate outrage and violence. So far it is, unquestionably, a partial war; but, nevertheless, it is a public war, on account of the public authority from which it emanates.

See also the case of the ship *Amelia*, 1 *Cranch*, 1, 8.

The legislation of Congress referred to was evidently intended to meet, combat and prevent by force the forceable capture of American vessels by French privateers, and to that extent was retaliatory; but no authority was given to prey upon French commerce or to invade French territory. Such acts in their nature not only authorized resistance to search and capture but authorized the capture of French armed vessels by way of retaliation for wrongs committed by the French on American commerce, and to that extent may be termed reprisals; but such reprisals on behalf of the United States were limited in their nature, and hardly amounted to more than was justified by the natural law of self-defense, as was held in the case of *Cushing, Administrator*, 22 *C. Cls.*, 1, 37; *The Maria*, 1 *C. Rob.*, 340-374.

But we must keep in mind that the statutes to which we have referred respecting the authority of Congress to authorize American merchant vessels to defend against French depredations did not change the law of nations or impose a new international obligation upon France, as was held in the case of *The Ship Rose*, *supra*, p. 291. In that case it was urged that the belligerent in making the attack was not in the exercise of the legal right of search, but that the object and purpose of the assault was the seizure and condemnation without reference to the neutrality of the vessel engaged in peaceful and lawful commerce, in respect to which the court said:

The claimants are treading on very dangerous ground when they urge the higher law of self-preservation. Self-defense is founded on the theory that it is the only remedy, and that, being the only remedy, it presupposes the absence of all law protecting the rights of him who asserts the prerogative of self-defense. If the right of self defense prevailed to the extent of repelling force by force and was incident to the crew of the ship captured, then all other law was silent and war prevailed, which condition would be most disastrous to the case of the claimants.

This court early held that the seizure of American vessels on the ground that they were armed for defensive purposes was not justified. *Schooner Industry*, 22 *C. Cls.*, 1, 38. But that does not mean that such armed vessels were justified under the rules of international law in resisting search — repelling force by force. The court has proceeded upon

the theory in all the awards thus far made that the relation of the United States toward France, during her war with England, was that of a neutral toward a belligerent, thus recognizing the incontestable right of France to visit and search American vessels to guard against and prevent any assistance being given to her enemy contrary to the rules of international law.

In view of the authorities and the legislation of Congress to which we have referred, it is apparent that the theory adopted by the court was most advantageous to the claimants, as the legislation of Congress authorizing the arming of merchant vessels — coupled with commissions from the President — to seize French armed vessels and recapture American vessels was rather the act of an enemy than that of a neutral. And though France, by the legislation referred to, was designated as an enemy, and hostilities were authorized by certain persons in certain cases, the war thus carried on was held limited in its nature, and for that reason and that alone the court has recognized the right of France, a belligerent, to visit and search American vessels — that is to say, the court's ruling in effect has been that the United States did not elect to treat the acts of France in capturing our vessels as acts of war or reprisals, but treated them as acts in the exercise of the belligerent right of visit and search of the vessels of a neutral.

This view — as to the character of the claims — is supported by the act of our jurisdiction, which recognizes claims "arising out of illegal captures, detentions, seizures, condemnations, and confiscations prior to the ratification" of the treaty of 1800. Only such claims as grew out of the illegal acts of France prior to that treaty are recognized by the act, so that such claims rest upon international law and treaty rights.

As was said in the case of the *Schooner John*, 22 C. Cls., 408, 456,

France did not contend that the Jay Treaty abrogated the treaties of 1778; on the contrary, her whole argument, down to the ratification of the treaty of 1800, was based upon the premise that these treaties were of enduring force. * * * France did not deny at any point of the negotiations which led to the treaty of 1800 her liability for claims known by the generic name of "spoliations," but claimed in return for payment recognition of treaties, a demand which was not granted, and the contention remained embodied in the second article, which was stricken out. Thus was completed what Madison called the "bargain" by which we released "spoliations" in consideration of release from all obligations founded upon the treaties of 1778. * * * To term the decrees of France and the acts of their privateers under them "acts of reprisal" does not alter the facts or the legal position. That position has been defined by the Supreme Court of the United States as limited partial war. We, follow-

ing the path indicated by that tribunal, have defined it as "limited war in its nature similar to a prolonged series of reprisals." The result of that partial limited war, the result of the negotiations for settlement, the agreement reached by the two parties which made the government of the United States liable over to its citizens we have heretofore considered so much in detail that we shall not now repeat it, and we need only state briefly the result heretofore reached by us, and in which we, after re-examination, are confirmed, that the acts of France now in question, whether called "reprisals" or acts of limited warfare, were contended by the United States to be illegal, were admitted so to be by France; that France stood ready to make the compensation made by England and Spain for similar acts on their part, provided we would admit certain claims of her own; which we declined to do; and finally, by the substitution of the existing second article of the treaty for that agreed upon by the negotiators, these claims were surrendered in consideration of a release from the French demand.

It will thus be seen that the character of these claims, whether considered as reprisals or otherwise, have heretofore been considered by this court and a conclusion reached adverse to the claimants, *i. e.*, that the captures were illegal and so conceded to be by France.

If the captures from 1796 to 1800 be treated as reprisals justifying resistance, the United States did not elect to regard such captures as acts of war unless the acts of Congress referred to be so considered, and if they be so considered then war prevailed and the captures became lawful prizes of war. But Congress, in whom the power resides, did not see fit to declare war, and the actual hostilities carried on were not only limited but were of a defensive character; so that the court must adhere to its former rulings respecting the liability of France for the illegal capture of American vessels.

That is to say, the liability of France under the act of our jurisdiction must be determined upon the basis of her illegal acts, the United States in their capacity as a neutral recognizing the belligerent right of France to visit and search American vessels; and that such right can not be transformed into a wrong by means of resistance thereto, whether such resistance be successful or otherwise. Hence, resistance to search renders a vessel liable to confiscation, the degrees of which the court can not differentiate without invading the right of the belligerent to protect itself against the possible unlawful acts of a neutral, as was held in the case of the *Schooner Jane*, 37 C. Cls., 24, 30.

The convention of September 30, 1800, 8 Stat. L., 178, was based on the desire to terminate not war but "the differences which have arisen between the two states." France recognized her liability for the illegal acts of her privateers, and was willing to release her claim against

the United States in consideration of the release by the United States of the liability of France to American citizens. Upon this theory the act of our jurisdiction, *23 Stat. L., 283*, was passed. Congress did not thereby recognize them as claims originating in war. On the contrary, section one of the act provides:

That such citizens of the United States, or their legal representatives, as had valid claims to indemnify upon the French government arising out of illegal captures, detentions, seizures, condemnations, and confiscations prior to the ratification of the convention between the United States and the French Republic concluded on the thirtieth day of September, eighteen hundred, the ratifications of which were exchanged on the thirty-first day of July following, may apply by petition to the Court of Claims, within two years from the passage of this act, as hereinafter provided.

Therefore, in the consideration of these French spoliation claims the court has followed the executive and political departments of the government in treating them as claims arising out of the illegal acts of France and not as claims originating in war.

Now, to apply what we have said: On Oct. 11, 1799, while sailing under convoy from Demarara by the way of Martinico, St. Kitts, and Tortola, and after leaving the latter place and after parting from the convoy, the schooner *Endeavor*, whose master bore a letter of marque, was fired upon by a French privateer, *La Victor*, Mace, master, under French national colors, after which the master of the *Endeavor* "put himself in the best order of defense and commenced firing his stern chaser; that upon his firing the second gun the privateer struck national and hoisted the bloody flag." The master of the *Endeavor* "then struck his colors, hoisted out his boat, and went on board the privateer with his papers," and a prize master and crew were placed on board the *Endeavor*. The master of the *Endeavor* and his crew were then transferred to the privateer and the prize master was ordered to conduct the *Endeavor* to Porto Rico, and while on the way thither the *Endeavor* was retaken by an English frigate, who took out a salvage of one-eighth of the estimated value of the cargo in coffee and then turned her over to her mate. On November 15, 1799, the *Endeavor* was again taken by a French privateer, *The Alliance*, who put five men on board and ordered her to Porto Rico, where she arrived three days later. Upon the arrival of the vessel at Porto Rico the mate who had succeeded to the duties of the master, *Brig George, 1 Sumner R., 151, 156*, was im-

prisoned without money or friends and on December 24, 1799, at St. Thomas, after being released, he entered a protest, and from thence he returned to his home in Norfolk, Va.

The *Endeavor* and her cargo were then subsequently condemned as good prize for the benefit of the owners and crew of the *Alliance* by decree of the tribunal of commerce and prizes sitting at Basseterre, in the Island of Guadeloupe, in the month of January, 1800, and thereby became a total loss to the owners. One of the grounds of condemnation recited in the decree was that the vessel did not have on board a rôle d'équipage in due form as required by the treaty of 1778, and, further, the condition of vessels as regards their character as neutral or enemy shall be determined by their cargoes, and if found at sea and loaded in whole or in part with merchandise the product of England or her colonies will be declared good prize no matter who may be the owners of said goods or merchandise.

Now, while we reach the conclusion that the resistance of the master at the time of the first capture would have justified the captor in taking the vessel in for adjudication, such capture did not *per se* operate, as between enemies, to divest the title of the captured property; and that until legally condemned, the possession of the property by the government of the captor was in trust, *The Flad Oyen*, 1 C. Rob., 135; 3 C. Rob., 97; *The Henrick and Maria*, 4 C. Rob., 43, 53.

True, the resistance to search was at the time of the first capture, and it was not made a ground of condemnation at the time of the second capture, doubtless for the reason that the capture being made by a different privateer it was unknown to the second captor at the time. But it was a defense which would have been available to France and is, therefore, under the rulings of this court, now available as a defense by the United States. *Ship Joanna*, 24 C. Cls., 198, 203. In that case a vessel carrying contraband had been condemned on another ground, and the United States interposed the defense of contraband, which would have been available to France at the time, in respect to which the court said:

So in this court, under this peculiar jurisdiction, the defendants are at liberty to show that, while the specific reason set up by the prize court was not valid, as perhaps based upon a statute in derogation of the law of nations, still other facts appeared which, while not pressed in the prize tribunal, constituted a good defense to a diplomatic claim. The United States here is entitled to the defense which would have belonged to France at the time these claims were assumed.

Furthermore, on the second capture it is questionable whether the master, as against France, could have escaped the consequences of his resistance on the first capture; *The Maria*, 1 C. Rob., 340, 376. This court, in the case of the *Ship Galen*, 37 C. Cls., 89, 93, held that "a neutral may forfeit her neutral character by the fraudulent conduct of the master, by false destination, by resisting search." See also *The Baigorry*, 2 Wal., 474, 481.

In the present case the capture, recapture, and subsequent capture were while the *Endeavor* was on her return voyage to the United States; and the master, in addition to sailing from Demerara with an armed vessel, under convoy (though separating from the latter before capture), carried a commission issued by the President of the United States under the act of July 9, 1798, 1 Stat. L., 578, which commission gave the owners of the vessel the same authority for subduing, seizing, and capturing any armed French vessel and to recapture vessels, goods, and effects belonging to the people of the United States as the public armed vessels of the United States had under section 1 of said act.

In the case of *The Brig Joseph*, 8 Cranch, 451, the vessel sailed from Boston with a cargo of freight April 6, 1812, on a voyage to Liverpool and the north of Europe and thence directly or indirectly to the United States. The vessel arrived in Liverpool and there discharged her cargo; on June 30 following with another cargo taken in at Hull she sailed for St. Petersburg under protection of a British license granted June 8, 1812, which authorized the exportation to St. Petersburg and the importation of a cargo into England. The vessel arrived at St. Petersburg and there received the news of the war between the United States and Great Britain. October 20, 1812, the vessel sailed from St. Petersburg to London with a cargo consigned to merchants in London, having wintered in Sweden; in the spring of 1813 she sailed under convoy instructions from a British ship for London, where she arrived and delivered her cargo. May 29 she sailed for the United States in ballast under a British license and was captured on July 16, 1813, near Boston light-house by an American privateer and taken into Salem for adjudication and was condemned. The capture was held valid, and in the syllabus (on the margin of that case) it appears that "if an American vessel be captured on a circuitous voyage to the United States, in a former part of which voyage she has been guilty of conduct subjecting her to confiscation, though at the time of capture she is committing no illegal act, she must be condemned." That quotation is cited with

approval as par. 147 in the Digest, United States Supreme Court Reports, by the Lawyers Co-operative Publishing Co., vol. 4, p. 4738.

In referring to the ancient rule respecting the condemnation of a vessel for carrying contraband goods, the court, in the case of *Carrington and others v. The Merchants Insurance Company*, 8 Pet., 495, 520, by Justice Story, following the case of *The Neutralitet*, 3 Rob. R., 295, said:

The policy of modern times has, however, introduced a relaxation on this point, and the general rule now is that the vessel does not become confiscated for that act. But this rule is liable to exceptions. Where a ship belongs to the owner of the cargo, or where the ship is going on such service under a false destination or false papers, these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient rule. The cases in which this language was used were cases of capture upon the outward voyage. The same doctrine was afterwards held by the same learned judge to apply to cases where the vessel had sailed with false papers, and a false destination upon the outward voyage, and was captured on the return voyage. And, finally, in the cases of the *Rosalie* and the *Elizabeth*, in 1802, 4 Rob. R., (note to table of cases), the lords of appeal in prize cases held that the carriage of contraband outward with false papers will affect the return cargo with condemnation. * * * The belligerent has a right to require a frank and *bona fide* conduct on the part of neutrals in the course of their commerce in times of war; and if the latter will make use of fraud and false papers to elude the just rights of the belligerents, and to cloak their own illegal purposes, there is no injustice in applying to them the penalty of confiscation. The taint of the fraud travels with the party and his offending instrument during the whole course of the voyage and until the enterprise has, in the understanding of the party himself, completely terminated.

See also the case of *The Nereide*, 9 Cranch, 388.

Respecting resistance to search, where the master had sailed under instructions to prevent inquiry and search by force, the court in the case of *The Maria*, 1 C. Rob., *supra*, by Sir William Scott, said:

However that might be, the present fact is that the commander sails with instructions to prevent inquiry and search by force, which instructions he is bound to obey, and which he is prevented from acting upon to their utmost extent only by an irresistible force. Under such circumstances how does the presumption of abandonment arise? If it does, mark the consequences. If he meets with a superior force, he abandons his hostile purpose. If he meets with an inferior force, he carries it into complete effect. How much is this short of the ordinary state of actual hostility? What is hostility? It is violence where you can use violence with success; and where you cannot, it is submission and striking your colors. Nothing can be more clear, upon the perusal of these attesta-

tions, than that this gentleman abandoned his purpose merely as a subdued person in an unequal contest. The resistance is carried on as far as it can be, and when it can maintain itself no longer, *fugit indignata*.

In the case of *Maley v. Shattuck*, 3 Cranch, 457, 488, respecting the grounds upon which a vessel may forfeit her neutral character, the court, by Chief Justice Marshall, said:

It is well known that a vessel libeled as enemy's property is condemned as prize if she act in such manner as to forfeit the protection to which she is entitled by her neutral character. If, for example, a search be resisted, or an attempt be made to enter a blockaded port, the laws of war, as exercised by belligerents, authorize a condemnation as enemy's property, however clearly it may be proved that the vessel is in truth the vessel of a friend.

So here, where the master by force attempted to prevent visitation and search, he thereby forfeited his neutral character; and that being so, shall he, while on the same voyage, be dealt with by France as having reestablished his neutrality by yielding without force to a subsequent capture? We think not. And, therefore, we must hold that the resistance of the master to visitation and search at the time of the first capture was available to France as a defense at the time of the second capture, though no illegal act was then committed; and being a defense available to France at the time, it is now available to the United States under the act of our jurisdiction.

But the claimant contends that because the master of the vessel was spirited away, as shown in the findings, and was not examined in *preparatorio* or permitted to be present at the trial, the proceedings were *ex parte* and, therefore, illegal, notwithstanding the master's resistance to search. Furthermore, that the mate who succeeded to the duties of the master was imprisoned and not represented at the trial.

In the case of *The Anne, Barnabeu, 3 Wheat.*, 435, 447 (a British ship captured by an American privateer during the war between England and the United States in March, 1815), Mr. Justice Story, speaking for the court, said:

A capture made within neutral waters is, as between enemies, deemed, to all intents and purposes, rightful; it is only by the neutral sovereign that its legal validity can be called in question; and as to him and him only, is it to be considered void. The enemy has no rights whatsoever; and if the neutral sovereign omits or declines to interpose a claim, the property is condemnable, *jure belli*, to the captors. This is the clear result of the authorities; and the doctrine rests on well-established principles of public law.

(In a footnote on that same page it is stated: "The same rule is adhered to in the prize practice of France.")

That case was cited with approval in the case of *The Florida*, 101 U. S., 37, 42, where it was said:

A capture in neutral waters is valid as between belligerents. Neither a belligerent owner nor an individual enemy owner can be heard to complain. But the neutral sovereign whose territory has been violated may interpose and demand reparation, and is entitled to have the captured property restored.

Furthermore, it is there stated that:

The title to captured property always vests primarily in the government of the captors. The rights of individuals, where such rights exist, are the results of local law or regulations. Here the capture was promptly disavowed by the United States. They, therefore, never had any title.

In the case of the *Schooner Good Intent*, 36 C. Cls. R., 262, it is in substance held that the owners of a vessel have the right to defend their property, to show such facts as will establish the illegality of the seizure, and that if they are deprived of that right the condemnation is illegal.

In the case of the *Brig Sally*, 37 C. Cls. R., 74, 78, it was held that if the capture of the vessel was legal "it was the duty of the captain of the capturing vessel to afford the captain of the *Sally* every reasonable opportunity to assert and maintain his rights in the proceedings to condemn the vessel founded upon capture." Again it was there held that "it is not the seizure which confers the right of property upon a seizing vessel, but it is a judicial determination of the question of the liability of the ship founded upon such seizure."

In the case of the *Snow Thetis*, 37 C. Cls. R., 470, it was held:

Where the decree of the prize tribunal is silent as to the presence of the parties in interest, and there is neither protest nor proof equivalent to it showing that the owners or their agents were denied a hearing, the presumption is that they were present and given an opportunity to defend. But where it can be gathered from the action of the prize court or from proof contemporaneous with the transaction that the proceeding was one of those which justified the American complaint of that period respecting condemnations without notice to vessel owners, no effect will be given to the summary disposition of a vessel under such a decree.

In the case of the *Schooner Maria*, 39 C. Cls. R., 147, 152, it was in substance held that while the seizure and condemnation of a vessel may have been for good cause, it was the right of the master to be present at the

trial; and if prevented by imprisonment from so doing the proceeding was *ex parte* and wholly void. "Nor can it be held that the decree under the circumstances of this case was conclusive on that point, as the condemnation was *ex parte* and the proceedings illegal."

In the present case, aside from the master having by his resistance forfeited his neutral character, we think the owners of the property were represented at the trial. The decree, after stating the capture of the *Ship Endeavour* from Boston, Nathaniel Griffin, master, recites that "the examination made on Frimaire 2d last, on the occasion of said seizure, by Citizen Bébien, delegate in Porto Rico; the analysis of said vessel's papers in English compared and signed Bébien, by Citizen Menard, assistant sworn interpreter of said language," from which it may be inferred that the mate, acting master, was examined in *preparatorio*; but if not, then the decree "is silent as to the presence of the parties;" and as it is not recited in the protest that the mate was denied a hearing the presumption is, as held in *The Snow Thetis, supra*, that he was given an opportunity to defend. The burden is upon the claimant to show that he was not. The mate, though imprisoned at Porto Rico, thereafter in the island of St. Thomas on December 24th, made his protest, while the condemnation did not take place until January 7th following: he was at liberty, so far as appears by the record, to attend the trial in person if he had so desired. We must therefore hold that the condemnation was legal, and the motion for a new trial is overruled. The former findings are withdrawn and new findings now filed.

The findings herein together with this opinion will be certified to Congress.

GEORGIA V. TENNESSEE COPPER COMPANY

Supreme Court of the United States, 1907

(206 U. S. 230, 236)

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity filed in this court by the State of Georgia, in pursuance of a resolution of the legislature and by direction of the Governor of the State, to enjoin the defendant Copper Companies from discharging noxious gas from their works in Tennessee over the plaintiff's territory. It alleges that in consequence of such discharge a wholesale destruction of forests, orchards and crops is going on, and other injuries

are done and threatened in five counties of the State. It alleges also a vain application to the State of Tennessee for relief. A preliminary injunction was denied, but, as there was ground to fear that great and irreparable damage might be done, an early day was fixed for the final hearing and the parties were given leave, if so minded, to try the case on affidavits. This has been done without objection, and, although the method would be unsatisfactory if our decision turned on any nice question of fact, in the view that we take we think it unlikely that either party has suffered harm.

The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. The alleged damage to the State as a private owner is merely a makeweight, and we may lay on one side the dispute as to whether the destruction of forests has led to the gully-ing of its roads.

The caution with which demands of this sort, on the part of a State, for relief from injuries analogous to torts, must be examined, is dwelt upon in *Missouri v. Illinois*, 200 U. S. 496, 520, 521. But it is plain that some such demands must be recognized, if the grounds alleged are proved. When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court. *Missouri v. Illinois*, 180 U. S. 208, 241.

Some peculiarities necessarily mark a suit of this kind. If the State has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up quasi-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice it may insist that an

infraction of them shall be stopped. The States by entering the Union did not sink to the position of private owners subject to one system of private law. This court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power. Without excluding the considerations that equity always takes into account, we can not give the weight that was given them in argument to a comparison between the damage threatened to the plaintiff and the calamity of a possible stop to the defendants' business, the question of health, the character of the forests as a first or second growth, the commercial possibility or impossibility of reducing the fumes to sulphuric acid, the special adaptation of the business to the place.

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source. If any such demand is to be enforced this must be, notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether for the injuries which they might be suffering to their property they should not be left to an action at law.

The proof requires but a few words. It is not denied that the defendants generate in their works near the Georgia line large quantities of sulphur dioxide which becomes sulphurous acid by its mixture with the air. It hardly is denied and can not be denied with success that this gas often is carried by the wind great distances and over great tracts of Georgia land. On the evidence the pollution of the air and the magnitude of that pollution are not open to dispute. Without any attempt to go into details immaterial to the suit, it is proper to add that we are satisfied by a preponderance of evidence that the sulphurous fumes cause and threaten damage on so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff State as to make out a case within the requirements of *Missouri v. Illinois*, 200 U. S. 496. Whether Georgia by insisting upon this claim is doing more harm than good to her own citizens is for her to determine. The possible disaster to those outside the State must be accepted as a consequence of her standing upon her extreme rights.

It is argued that the State has been guilty of laches. We deem it unnecessary to consider how far such a defence would be available in a suit of this sort, since, in our opinion, due diligence has been shown. The conditions have been different until recent years. After the evil had grown greater in 1904 the State brought a bill in this court. The defendants, however, already were abandoning the old method of roasting ore in open heaps and it was hoped that the change would stop the trouble. They were ready to agree not to return to that method, and upon such an agreement being made the bill was dismissed without prejudice. But the plaintiff now finds, or thinks that it finds, that the tall chimneys in present use cause the poisonous gases to be carried to greater distances than ever before and that the evil has not been helped.

If the State of Georgia adheres to its determination, there is no alternative to issuing an injunction, after allowing a reasonable time to the defendants to complete the structures that they are now building, and the efforts that they are making to stop the fumes. The plaintiff may submit a form of decree on the coming in of this court in October next.

Injunction to issue.

MR. JUSTICE HARLAN, concurring.

The State of Georgia is, in my opinion, entitled to a general relief sought by its bill, and, therefore, I concur in the result. With some things, however, contained in the opinion, or to be implied from its language, I do not concur. When the Constitution gave this court original jurisdiction in cases "in which a State shall be a party," it was not intended, I think, to authorize the court to apply in its behalf, any principle or rule of equity that would not be applied, under the same facts, in suits wholly between private parties. If this was a suit between private parties, and if under the evidence, a court of equity would not give the plaintiff an injunction, then it ought not to grant relief, under like circumstances, to the plaintiff, because it happens to be a State possessing some powers of sovereignty. Georgia is entitled to the relief sought, not because it is a State, but because it is a party which has established its right to such relief by proof. The opinion, if I do not mistake its scope, proceeds largely upon the ground that this court, sitting in this case as a court of equity, owes some special duty to Georgia as a State, although it is a party, while under the same facts, it would not owe any such duty to the plaintiff, if an individual.

DECISION OF THE PERMANENT COURT OF ARBITRATION IN THE MATTER OF
THE MARITIME BOUNDARY DISPUTE BETWEEN NORWAY AND SWEDEN

Whereas, by Convention under date of March 14, 1908, Norway and Sweden agreed to submit to the final decision of a Tribunal of Arbitration, comprised of a president who shall neither be a subject of either of the contracting parties nor domiciled in either of the two countries, and of two other Members of whom one shall be a Norwegian and the other a Swede, the question of the maritime boundary between Norway and Sweden as far as this boundary has not been determined by the royal resolution of March 15, 1904; and

Whereas, in pursuance to said convention, the two Governments have appointed respectively as president and arbitrators:

Mr. J. A. Loeff, Doctor of Law and Political Sciences, former Minister of Justice, Member of the Second Chamber of the States-General of the Netherlands;

Mr. F. V. N. Beichmann, President of the Court of Appeals of Trondhjem, and

Mr. K. Hj. L. de Hammarskjöld, Doctor of Law, former Minister of Justice, former Minister of Public Worship and Public Construction, former Envoy Extraordinary and Minister Plenipotentiary to Copenhagen, former President of the Court of Appeals of Jönköping, former Professor in the Faculty of Law of Upsal, Governor of the Province of Upsal, Member of the Permanent Court of Arbitration; and

Whereas, in accordance with the provisions of the Convention, the memorials, counter memorials, and replications have been duly exchanged between the parties and communicated to the arbitrators within the periods fixed by the President of the Court; and

Whereas, the two Governments have respectively appointed as agents, to wit:

The Government of Norway, Mr. Kristen Johanssen, attorney at the Supreme Court of Norway; and the Government of Sweden, Mr. C. O. Montan, former member of the Court of Appeals of Svea, Judge in the Mixed Court of Alexandria; and

Whereas, it has been agreed by Article II of the Convention:

1. That the Court of Arbitration shall determine the boundary line in the waters from the point indicated by XVIII on the map annexed to the project of the Norwegian and Swedish Commissioners of August 18, 1897, in the sea as far as the limit of the territorial waters;

2. That the lines, limiting the zone which may be the subject of litigation in consequence of the conclusions of the parties and within which the boundary line shall consequently be established, must not be traced in such a way as to comprise either islands, islets, or reefs which are not constantly under water; and

Whereas, it has likewise been agreed by Article III of the said Convention:

1. That the Tribunal of Arbitration must decide whether the boundary line is to be considered, either wholly or in part, as being fixed by the boundary treaty of 1661 together with the map thereto annexed, and in what manner the line thus established should be placed.

2. That, as far as the boundary line shall not be considered as fixed by said treaty and said map, the Tribunal shall fix this boundary line, taking into account the circumstances of fact and the principles of international law; and

Whereas, the agents of the parties have presented the following conclusions to the Tribunal:

The agent of the Norwegian Government:

That the boundary between Norway and Sweden within the zone which constitutes the object of the arbitral decision, shall be determined in accordance with the line indicated on the map annexed, under No. 35, to the memorial presented in behalf of the Norwegian Government.

And the agent of the Swedish Government:

I. As regards the preliminary questions:

May it please the Tribunal of Arbitration to declare that the boundary line in dispute, as regards the space between point XVIII as already fixed on the map of the Commissioners of 1897, and point A on the map of the boundary treaty of 1661, is but incompletely established by the said treaty and the map annexed thereto, for the reason that the exact situation of this point is not shown clearly therein, and, as regards the rest of the space, extending westward from the same point A to the territorial boundary, that the boundary line was not established at all by these documents.

II. As regards these main questions:

1. May it please the Tribunal to be guided by the treaty and map of 1661; to take into account the circumstances of fact and the principles of the law of nations, and to determine the maritime boundary line in dispute between Sweden and Norway from point XVIII as already fixed, in such a manner that in the first place the boundary line shall be

traced in a straight line to a point which constitutes the middle point of a straight line, connecting the northernmost reef of the Rösökären, belonging to the Koster Islands, that is to say, the reef indicated on table 5 of the report of 1906 as being surrounded with depths 9, 10, and 10, and the southernmost reef of the Svartskjär, belonging to the Tisler Islands, and which is furnished with a beacon, which point is indicated on the same table 5 as the point XIX.

2. May it please the Tribunal further to take account of the circumstances of fact and the principles of the law of nations and establish the rest of the disputed boundary in such a manner that —

a. Starting from the point fixed according to the conclusions of paragraph 1 and designated as point XIX, the boundary line shall be traced in a straight line to a point situated midway on a straight line connecting the northernmost of the reefs indicated under the name of Stora Drammen, on the Swedish side and the Hejeknub rock, situated to the southeast of Heja Island, on the Norwegian side, which point is indicated on the said table 5 as point XX; and

b. Starting from the point last mentioned, the boundary shall be traced in a straight line due west as far into the sea as the maritime territories of the two nations are supposed to extend. And

Whereas, the line mentioned in the conclusions of the Norwegian agent is traced as follows:

From point XVIII as indicated on the map of the Commissioners of 1897, in a straight line to point XIX situated midway on a line drawn between the southernmost reef of the Svartskjär (the reef which is furnished with a beacon) and the northernmost reef of the Rösökären.

From this point XIX in a straight line to point XX, situated midway on a line drawn between the southernmost reef of the Heiefluer (söndre Heieflu) and the northernmost of the reefs comprised under the name of Stora Drammen.

From this point XX to point XXa, following a perpendicular drawn from the middle of the last mentioned line.

From this point XXa to point XXb, following a perpendicular drawn from the middle of the line connecting the said southernmost reef of the Heieflu with the southernmost of the reefs comprised under the name of Stora Drammen.

From this point XXb to point XXc, following a perpendicular drawn from the middle of a line connecting the Söndre Heiefluer with the small reef situated to the north of Klöfningen islet near Mörholmen.

From this point XXc to point XXd, following a perpendicular drawn from the middle of a line connecting the Midtre Heieflu with the said reef to the north of Klöfnungen islet.

From this point XXd, following a perpendicular drawn from the middle of the line connecting the Midtre Heieflu with a small reef situated west of the said Klöfnungen to point XXI, where the circles cross which are drawn around said reefs with a radius of 4 nautical miles (60 to a degree). And

Whereas, after the Tribunal had visited the disputed zone, examined the documents and maps which had been presented to it, and heard the pleas and replies as well as the explanations furnished it at its request, the discussion was declared terminated at the session of October 18, 1909. And

Whereas, as regards the interpretation of certain expressions used in the convention and regarding which the two parties expressed different opinions during the course of the discussion —

In the first place the Tribunal is of opinion that the clause in accordance with which it is to determine the boundary line in the sea *as far as the limit of the territorial waters* has no other purpose than to exclude the possibility of an incomplete determination, which might give rise to a new boundary dispute in future. And

It was obviously not the intention of the parties to fix in advance the terminal point of the boundary, so that the Tribunal would have only to determine the direction between two given points. And

In the second place, the clause in accordance with which the lines bounding the zone which may be the subject of dispute in consequence of the conclusions of the parties *must not be traced in such a manner as to comprise either islands, islets, or reefs which are not constantly under water* can not be interpreted so as to imply that the islands, islets, and reefs aforementioned ought necessarily to be taken as points of departure in the determination of the boundary. And

Whereas, therefore, in the two respects aforementioned, the Tribunal preserves full freedom to pass on the boundary within the limits of the respective contentions. And

Whereas, under the terms of the Convention, the task of the Tribunal consists in determining the boundary line in the water from the point indicated as XVIII on the map annexed to the project of the Norwegian and Swedish Commissioners of August 18, 1897, in the sea as far as the limit of the territorial waters. And

Whereas, as regards the question "Whether the boundary line should be considered, either wholly or in part, as being fixed by the boundary treaty of 1661 and the map thereto annexed," the answer to this question should be negative, at least as regards the boundary line beyond point A on the aforementioned map. And

Whereas, the exact situation of point A on this map can not be determined with absolute precision, but at all events it is a point situated between points XIX and XX, as these points will be determined hereinafter. And

Whereas, the parties in litigation agree as regards the boundary line from point XVIII on the map of August 18, 1897, to point XIX as indicated in the Swedish conclusions, and

Whereas, as regards the boundary line from the said point XIX to a point indicated by XX on the maps annexed to the memorials, the parties likewise agree, except that they differ with regard to whether, in determining point XX, the Heiefluer or the Heieknub should be taken as a starting point from the Norwegian side. And

Whereas, in this connection, the parties have adopted, at least in practice, the rule of making the division along the median line drawn between the islands, islets, and reefs situated on both sides and not constantly submerged, as having been in their opinion the rule which was applied on this side of point A by the treaty of 1661; and

The adoption of a rule on such grounds should, without regard to the question whether the rule invoked was really applied by said treaty, have as a logical consequence, in applying it at the present time, that one should take into account at the same time the circumstances of fact which existed at the time of the treaty. And

Whereas, the Heiefluer are reefs which, it may be asserted with sufficient certainty, did not immerge from the water at the time of the boundary treaty of 1661 and consequently they could not have served as a starting point in defining a boundary. And

Whereas, therefore, from the above mentioned standpoint the Heieknub should be preferred to the Heiefluer. And

Whereas, point XX being fixed, there remains to be determined the boundary from this point XX to the limit of the territorial waters. And

Whereas, point XX is situated, without any doubt, beyond point A as indicated on the map annexed to the boundary treaty of 1661. And

Whereas, Norway has held the contention, which for that matter has not been rejected by Sweden, that from the sole fact of the Peace of

Roskilde in 1658 the maritime territory in question was divided automatically between her and Sweden. And

Whereas, the Tribunal fully endorses this opinion. And

Whereas, this opinion is in conformity with the fundamental principles of the law of nations, both ancient and modern, in accordance with which the maritime territory is an essential appurtenance of land territory, whence it follows that at the time when, in 1658, the land territory called The Bohuslan was ceded to Sweden, the radius of maritime territory constituting an inseparable appurtenance of this land territory must have automatically formed a part of this cession. And

Whereas, it follows from this line of argument that in order to ascertain which may have been the automatic dividing line of 1658 we must have recourse to the principles of law in force at that time. And

Whereas, Norway claims that, inside (on this side) of the Koster-Tisler line, the rule of the boundary documents of 1661 having been that the boundary ought to follow the median line between the islands, islets, and reefs on both sides, the same principle should be applied with regard to the boundary beyond this line. And

Whereas, it is not demonstrated that the boundary line fixed by the treaty and traced on the boundary map was based on this rule, and there are some details and peculiarities in the line traced which even give rise to serious doubts in this regard, and even if one admitted the existence of this rule in connection with the boundary line fixed by the treaty, it would not necessarily follow that the same rule ought to have been applied in determining the boundary in the exterior territory. And

Whereas, in this connection,

The boundary treaty of 1661 and the map thereto annexed make the boundary line *begin* between Koster and Tisler Islands; and

In determining the boundary line they went in a direction from the sea toward the coast and not from the coast toward the sea; and

It is out of the question to say that there might have been a continuation of this boundary line in a seaward direction; and

Consequently, the connecting link is lacking in order to enable us to presume, without decisive evidence, that the same rule was applied simultaneously to the territories situated this side and to those situated that side of the Koster-Tisler line. And

Whereas, moreover, neither the boundary treaty nor the map appertaining thereto mentioned any islands, islets, or reefs situated beyond the Koster-Tisler line, and therefore, in order to keep within the probable

intent of these documents we must disregard such islands, islets, and reefs. And

Whereas, again, the maritime territory belonging to a zone of a certain width presents numerous peculiarities which distinguish it from the land territory and from the maritime spaces more or less completely surrounded by these territories. And

Whereas, furthermore, in the same connection, the rules regarding maritime territory can not serve as a guide in determining the boundary between two contiguous countries, especially as, in the present case, we have to determine a boundary which is said to have been automatically traced in 1658, whereas the rules invoked date from subsequent centuries;

And it is the same way with the rules of Norwegian municipal law concerning the definition of boundaries between private properties or between administrative districts. And

Whereas, for all these reasons, one can not adopt the method by which Norway has proposed to define the boundary from point XX to the territorial limit. And

Whereas, the rule of drawing a median line midway between the inhabited lands does not find sufficient support in the law of nations in force in the seventeenth century. And

Whereas, it is the same way with the rule of the *thalweg* or the most important channel, inasmuch as the documents invoked for the purpose do not demonstrate that this rule was followed in the present case. And

Whereas, we shall be acting much more in accord with the ideas of the seventeenth century and with the notions of law prevailing at that time if we admit that the automatic division of the territory in question must have taken place according to the general direction of the land territory of which the maritime territory constituted an appurtenance, and if we consequently apply this same rule at the present time in order to arrive at a just and lawful determination of the boundary. And

Whereas, consequently, the automatic dividing line of 1658 should be determined (or, what is exactly the same thing expressed in other words) the delimitation should be made today by tracing a line perpendicularly to the general direction of the coast, while taking into account the necessity of indicating the boundary in a clear and unmistakable manner, thus facilitating its observation by the interested parties as far as possible. And

Whereas, in order to ascertain what is this direction we must take equally into account the direction of the coast situated on both sides of the boundary. And

Whereas, the general direction of the coast, according to the expert and conscientious survey of the Tribunal, swerves about 20 degrees westward from due north, and therefore the perpendicular line should run toward the west to about 20 degrees to the south. And

Whereas, the parties agree in admitting the great unsuitability of tracing the boundary line across important bars; and

A boundary line drawn from point XX in a westerly direction to 19 degrees to the south would completely obviate this inconvenience, since it would pass just to the north of the Grisbadarna and to the south of Skjöttegrunde and would also not cut through any other important bank; and

Consequently, the boundary line ought to be traced from point XX westward to 19 degrees south, so that it would pass midway between the Grisbadarna banks on the one side and Skjöttegrunde on the other. And

Whereas, although the parties have not indicated any marks of alignment for a boundary line thus traced there is reason to believe that it will not be impossible to find such marks. And

Whereas, on the other hand, we could, if necessary, avail ourselves of other known methods of marking the boundary. And

Whereas, a demarkation which would assign the Grisbadarna to Sweden is supported by all of several circumstances of fact which were pointed out during the discussion and of which the following are the principal ones:

a. The circumstance that lobster fishing in the shoals of Grisbadarna has been carried on for a much longer time, to a much larger extent, and by much larger number of fishers by the subjects of Sweden than by the subjects of Norway.

b. The circumstance that Sweden has performed various acts in the Grisbadarna region, especially of late, owing to her conviction that these regions were Swedish, as, for instance, the placing of beacons, the measurement of the sea, and the installation of a light-boat, being acts which involved considerable expense and in doing which she not only thought that she was exercising her right but even more that she was performing her duty; whereas Norway, according to her own admission, showed much less solicitude in this region in these various regards. And

Whereas, as regards the circumstance of fact mentioned in paragraph a above,

It is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible; and

This rule is specially applicable in a case of private interests which, if once neglected, can not be effectively safeguarded by any manner of sacrifice on the part of the Government of which the interested parties are subjects; and

Lobster fishing is much the most important fishing on the Grisbadarna banks, this fishing being the very thing that gives the banks their value as fisheries;

Without doubt the Swedes were the first to fish lobsters by means of the tackle and craft necessary to engage in fishing as far out at sea as the banks in question are situated;

Fishing is, generally speaking, of more importance to the inhabitants of Koster than to those of Hvaler, the latter having, at least until comparatively recent times, engaged rather in navigation than fishing;

From these various circumstances it appears so probable as to be almost certain that the Swedes utilized the banks in question much earlier and much more effectively than the Norwegians;

The depositions and declarations of the witnesses are, generally speaking, in perfect harmony with this conclusion;

The arbitration Convention is likewise in full accord with the same conclusion;

According to this Convention there is a certain connection between the enjoyment of the fisheries of the Grisbadarna and the keeping up of the light-boat, and, as Sweden will be obliged to keep up the light-boat as long as the present state of affairs continues, this shows that, according to the arguments of this clause, the principal enjoyment thereof is now due to Sweden. And

Whereas, as regards the circumstances of fact as mentioned under *b*:

As regards the placing of beacons and of a light-boat —

The stationing of a light-boat, which is necessary to the safety of navigation in the regions of Grisbadarna, was done by Sweden without meeting any protest and even at the initiative of Norway, and likewise a large number of beacons were established there without giving rise to any protests; and

This light-boat and these beacons are always maintained by Sweden at her own expense; and

Norway has never taken any measures which are in any way equivalent except by placing a bellbuoy there at a time subsequent to the placing of the beacons and for a short period of time, it being impossible to even compare the expenses of setting out and keeping up this buoy with those connected with the beacons and the light-boat; and

It is shown by the foregoing that Sweden had no doubt as to her rights over the Grisbadarna and that she did not hesitate to incur the expenses incumbent on the owner and possessor of these banks even to the extent of a considerable sum of money.

As to the measurements of the sea —

Sweden took the first steps, about thirty years before the beginning of any dispute, toward making exact, laborious, and expensive measurements of the regions of Grisbadarna, while the measurements made some years later by Norway did not even attain the limits of the Swedish measurements. And

Whereas, therefore, there is no doubt whatever that the assignment of the Grisbadarna banks to Sweden is in perfect accord with the most important circumstances of fact. And

Whereas, a demarkation assigning the Skjöttegrunde (which are the least important parts of the disputed territory) to Norway is sufficiently warranted by the serious circumstance of fact that, although one must infer from the various documents and testimony that the Swedish fishers, as was stated above, have carried on fishing in the regions in question for a longer period, to a greater extent, and in greater numbers, it is certain on the other hand that the Norwegian fishers have never been excluded from fishing there. And

Whereas, moreover, it is averred that the Norwegian fishers have almost always participated in the lobster fishing on the Skjöttegrunde in a comparatively more effective manner than at the Grisbadarna:

THEREFORE —

The Tribunal decides and pronounces:

That the maritime boundary between Norway and Sweden, as far as it was not determined by the royal resolution of March 15, 1904, is fixed as follows:

From point XVIII situated as indicated on the map annexed to the project of the Norwegian and Swedish Commissioners of August 18, 1897, a straight line is traced to point XIX, constituting the middle point of a straight line drawn from the northernmost reef of the Röskären to the southernmost reef of the Svartskjär, the one which is provided with a beacon;

From point XIX thus fixed, a straight line is traced to point XX, which constitutes the middle point of a straight line drawn from the northernmost reef of the group of reefs called Stora Drammen to the Hejeknub situated to the southeast of Heja Islands; from point XX a

straight line is drawn in a direction of west 19 degrees south, which line passes midway between the Grisbadarna and the Skjöttegrunde south and extends in the same direction until it reaches the high sea.

Done at The Hague, October 23, 1909, in the Palace of the Permanent Court of Arbitration.

J. A. LOEFF, *President*,

MICHIËLS VAN VERDUYNEN, *Secretary General*,

ROELL, *Secretary*.

BOOK REVIEWS¹

La nationalité dans les principaux États du Globe. By Ernest Lehr.
Paris: A. Pedone. 1909. pp. 227.

This modest volume by Professor Lehr gives, for forty-nine different countries alphabetically arranged, the rules of each governing the acquisition, the loss and the regaining of nationality. These rules are prefaced by a chapter of summaries. It seems a good and useful compilation. Covering so wide a field in minute detail, absolute accuracy may not have been attainable. The author dwells upon the constantly changing rules which would make certainty as to the law at any given moment perhaps impossible. Nor can the reviewer presume to a knowledge of the laws of all nations respecting citizenship. His criticism will relate to omission rather than commission, and it is not criticism so much as regret that the statement of the law could not have been brought down a little nearer to the publication date, and that so full and complete a treatise could not have been made a little more complete.

For instance, it rather is a pity not to have included the South African Republic in the list of countries discussed, in spite of its loss of sovereignty, for the sake of historical completeness, inasmuch as the question of naturalization there was one of the leading causes of the memorable war with Great Britain.

The separation of Norway from Sweden in 1905 is apparently too recent an event to be noticed even in a work published in 1909, and in consequence we are not told whether the dissolution of the union has modified the naturalization laws of either country; whether, for example, the subjects of the one resorting to the other are regarded with peculiar favor.

The important United States Citizenship Act, approved March 2, 1907, is likewise unnoticed. This Act has an interesting provision by which subjects of other states naturalized in the United States, upon resumption of residence for two years in their country of origin, or for five years in any other foreign country, are presumed to have lost their

¹The JOURNAL assumes no responsibility for the views expressed in signed Book Reviews. — J. B. S.

American citizenship. Our naturalization treaty of 1868 with the North German Union furnishes a precedent for the two year presumption clause, but this has not caught the notice of the author. In fact, in section 50, he makes a statement directly at variance with the facts under that treaty. Reference is made, section 45, note, to the Bancroft treaty but its practical bearing upon German evasion of military service is not touched upon.

In the chapter of summaries which is valuable and interesting particularly as showing some peculiar features of naturalization general in the Latin-American states, there is no tabulation of the length of residence requisite for naturalization, which is a real lack. Is the five year period, as in Cuba, really coming into general vogue, or at least is there a tendency thereto? The author should have told us. In these comparatively simple respects, a good treatment of a subject admittedly complex might have been made fuller and more recent and perhaps better.

T. S. WOOLSEY.

Les Lois De La Guerre et Les Deux Conférences De La Haye (1899-1907). By Paul Boidin. Paris: A. Pedone. 1908. pp. 282.

Lieutenant Boidin is a doctor in law and an instructor in the Military School of Rambouillet. His work is another instance of the relatively large interest taken by French military men in international law or at least that part of the subject dealing with the law of war. And this interest is one of the hopeful signs of the times. In a branch of the law where so much must be left to the judgment of those who are to observe it, as is the case with the law of war and especially that part of it dealing with war on land, knowledge of its precepts on the part of those whose actions are controlled by it is indispensable to its efficacy. It is true that the third article of the convention with regard to the laws and customs of war on land drawn up at the Second Peace Conference provides that a belligerent party which violates the provisions of the annexed regulations shall, if the case demands, be liable to pay compensation, and it would seem that this provision looks to some at least quasi-judicial enforcement of the laws of war on land, but at best it would seem to look to some international commission of inquest or arbitration, the practical working of which in cases of this kind is for the future to determine. Up to the present at least the enforcement of the laws of war on land has lain with the military authorities of the respective belligerents, subject to such control by the political authorities in notable cases as considerations

of policy and humanity, the recriminations of the adversary and public opinion have demanded. There have been no prize courts for the judiciary to keep the army within the law such as enable the judiciary to exercise a very considerable check on violations of the law at sea. It is military men above all others therefore, that should be conversant with the laws of war and the publication of a work of so high a character as this by Lieutenant Boidin, himself a doctor in law, is a matter of encouragement especially as it is not an isolated case but is rather an instance of a very general interest taken by French military men in recent years. French jurists lead the world to-day in this branch of the law and it is but fitting that French soldiers should lead in making it a living thing to those on whom its execution primarily depends. One point that the author urges with great force is that the study of war and its laws should go hand in hand, that on the one hand the jurists who treat of the laws of war should know something of its technique and that on the other hand military schools should not leave such a large proportion of the instruction in the laws of war to the university faculties.

It is equally important, however, that with a knowledge of the law of war on the part of military men should go a sympathetic understanding of its precepts. Many of the rules drawn up at the Peace Conferences would amount to little in the hands of hostile commanders. Take Regulation XXIII(g), for instance, in which it is forbidden to destroy or seize the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of the war. In the hands of a hostile commander the necessities of war might be given such a broad interpretation as to render the regulation little more than so much waste paper. In the hands of a commander imbued with loyalty to the regulations, however, such a regulation might make him think twice before adopting some measure of devastation suggested by military necessities but possibly to be avoided on second thought. Accordingly it is pleasing to those who have the future of the Hague Regulations at heart that a military man with the undoubted insight of Lieutenant Boidin should express his warm though not uncritical approval of them. It is symptomatic of the way that responsible military critics will regard them and bodes well for their future. And it seems clear that such approval is deserved, as military men had such a large part in their formulation.

The work is divided into two parts. In the first sixty-eight pages the author considers the principles underlying the law of war, the proper scope of the work of bodies like the Peace Conferences and the proper

field of application of the rules laid down by them. The remainder of the work is a running commentary on the work done at The Hague. It shows a clear grasp of the situations which the regulations are intended to meet and, although inclined to be *doctrinaire* in ascribing only interested motives to the various delegations, is unusually fair and open-minded on most points. The author repudiates the chance remark of Rousseau which has been made the creed of so many jurists as a fundamental rule of the law of war and insists instead on a thorough application of that other rule that useless injury shall be avoided. The work is a clear, interesting criticism of the work done at The Hague by a fair-minded military man with knowledge and appreciation of the law involved.

PERCY BORDWELL.

The Rhodian Sea-Law, edited from the manuscripts by Walter Ashburner, M. A. Oxford: The Clarendon Press. 1909. (pp. ccxciii, 132.)

This scholarly book is at once an inspiration and a despair to the student of the mediæval maritime codes, an inspiration to apply to other bodies of similar law the same critical methods which have been directed to the early laws of Rhodes, and despair over the many problems which Mr. Ashburner raises as to the codes which are later in date. Until the same painstaking and laborious effort which has been expended upon the Rhodian Laws has been applied to the *Consolato del Mare*, the *Rooles d'Oléron* and the rest, the development of mediæval maritime law will continue to be an unsolved question. This is not to underestimate the monumental labors of Pardessus, whose *Collection des Lois Maritimes* (1828-45) is the usual but not always accessible source of information upon the subject. The writer of the present book shows that Pardessus's text of the Rhodian Laws is corrupt and inaccurate. There is reason to believe that the latter's version of the *Consolato* (followed by Twiss in his *Black Book of the Admiralty*) might be improved by the publication of a printed edition, earlier than that accessible to Pardessus, with a proper collation of the existing manuscripts.

The genuineness of the Rhodian Sea-Laws has been a subject of long controversy. First printed by Simon Schard in 1561 they were denounced as spurious by Bynkershoek and Heineccius. Until Pardessus printed his first volume there was no edition which could be called critical. Since then they have been edited by Heimbach, Zacharia, and Ferrini and Mercati in connection with the Byzantine *Basilica*. Not-

withstanding the labors of these eminent modern scholars, Mr. Ashburner seems to work in hitherto unploughed soil. His first task was to present an adequate text. To this end he has carefully collated more than twenty-five manuscripts, ranging in date from the tenth to the sixteenth centuries. Though he has made bold to adopt a "frank eclecticism" in the use of these manuscripts, his greatest dependence has been upon the "oldest as possibly the best MS. of the Sea Law."

The present work is in three parts: (1) an introduction of nearly three hundred pages; (2) the Greek text with a *critical apparatus* which may well excite surprise with its appalling wealth of variant readings; and, (3) an English translation and commentary. It would be invidious to attempt a comparison of the relative merits of the three parts. As an instance of the author's breadth of reading in the preparation of his commentary, he cites references to *Weld's Travels in North America* and to *MacMaster's History* to illustrate the prevalence of "gouging-matches" among the Mediterranean sailors (p. 85). It is in the introduction, however, that the author attempts the solution of the many problems of the sea-law. Among his conclusions are that while the Rhodian Law was originally compiled not later than A. D. 800, "and probably a good deal earlier" (p. liii), perhaps two centuries, it was *redacted* for incorporation in the *Basilica* (circa 890), and that notwithstanding the almost myriad variants of the manuscripts, "the sea-law, so far as its legal effects were concerned, remained substantially the same from the beginning of its career to the end," for it represented the maritime law of some parts of the Mediterranean down to the fifteenth century (p. xlix). The prologue, or "*auctoritas*," in two forms is thrown out as a spurious "rigmarole," leaving the work as a probably private compilation. The sources of the sea-law he investigates by a comparison with other legal monuments, especially the *Corpus Juris* and the *Ecloga*. The similarities with the former are frequent; with the latter he denies Zacharia's contention that there was any connection. "The sea-law was put together from materials of very different epochs and characters. Some of it was possibly from treatises in the nature of a 'Complete Merchant,' guides to a gentleman engaging in business. Other parts may have come from enactments of Byzantine Cæsars; but the mass of it must be derived from local customs (p. cxiii)."

Having so placed the Rhodian Law in relation to its history and sources, the author devotes much space to a comparison of it with the other bodies of maritime law, using for the purpose not only the more

general statements of the *Tables of Amalfi* and of the *Consolato*, but also the various mediæval city statutes and ordinances, as of Venice, Pisa, and Barcelona. This comparison is rendered the more striking and of greater historical value by a topical discussion of the development of several maritime legal doctrines, such as the contract for transportation, maritime loans, average, jettison and contribution. One of the most interesting of these is the demonstration of the aleatory character of maritime loans, and of the influence upon them of the mediæval doctrines of interest. Noteworthy also is his disagreement with Goldschmidt, who bases the principle of contribution not upon natural equity but upon an agreement growing out of the risk, in "agermanament." According to the author the consent of those engaged in the risk was only for the purpose of ascertaining if a case for jettison had arisen. To prove his contention he cites many references to maritime ordinances in the North as well as in the Mediterranean, while Goldschmidt relies largely upon the *Consolato*, never in Mr. Ashburner's mind a very good authority. Indeed one is struck throughout the book with the epithets directed against the Catalan compilation. It is "verbose" (p. cxx), containing "futile reasons" (p. cxxi), and has an "air of unreality about it" (p. cxxi), while its language is "confused" (p. cxciii) and "diffuse" (p. cclxxxvii). It is to be hoped that sometime a scholar of Mr. Ashburner's ability and zeal may attack the equally difficult problem of the *Consolato*, for so many years venerated as an authority. It may be that the shortcomings of the *Consolato* are due rather to its editors than to the work itself.

Mr. Ashburner has put all students of the history of maritime law under heavy obligations. It might be objected that the style of the work is rather forbidding. But the author did not set out to make a very readable book. He has successfully dared not to be popular. The result is that the work will probably not have to be done again by some succeeding investigator.

JESSE S. REEVES.

Der kranke Krieg. By Alfred H. Fried. Leipzig: Alfred Kröner, Verlag, 1909. pp. xii, 176. 1 mark.

"The Sick War" is the verbatim translation of the title of a new book recently published at Leipzig from the pen of Mr. Alfred H. Fried, the well known author of pacifist literature and editor of the "Friedenswarte." To the unbiased mind the book is all its title

implies, namely convincing proof that the cause of war is suffering from maladies which are bound sooner or later to prove fatal. It is an array of strong and for the most part unanswerable arguments in favor of a new order of things and against the old which recognizes force as the arbiter of international relations, and, it might well be termed a "lexicon of peace" inasmuch as every thought which a logical mind can conceive of in favor of a substitution of law and order for the anarchy of force is here presented in a most attractive form, namely with reference to events of contemporary history.

It is evident that the power of evolution and of moral progress is forcing the ideas of "pacifism" — for brevity's sake we must eventually adopt this newly coined word as a legitimate addition to the English language — more and more to the forefront of public discussion. The reasons are accumulating why all the civilized nations, owing to the great technical achievements of modern times and the resulting growth of international commerce, have entered into relations of mutual dependence which compel them to strive for a mutual understanding. Settlements of international differences by force appear constantly to become more difficult, more risky and more ruinous for all concerned. At the same time the burdens for war preparations become more and more unbearable. The prosperity and the culture of the people are hemmed in their development by the growing armaments of our day. Therefore, remonstrances against a system of force still in vogue in international relations, but no longer in harmony with the requirements of an enlightened age, are growing in volume and importance in all countries of the world, and the desire to regulate the mutual interests of the nations fairly and equitably and to bring about international order on the basis of law and justice at last become a burning question of practical politics.

Mr. Fried's book is a lucidly written analysis of this important and interesting process. It is divided into three parts. The first is given over to a discussion of war in all its aspects and of the prophylaxis of war. The possibility of an armed conflict in Europe is referred to and the reasons are given which, in the judgment of the author, will place such an eventuality outside the scope of wisdom. In a most striking way the author enumerates the causes which have led to a change of sentiment and will eventually lead to a change of system. In this connection he points to a fact which is patent to all, but is not yet generally realized, though no stronger proof could possibly be adduced for the growing internationalism of the human family. In former years govern-

ments and nations made their laws irrespective of other governments and nations. To-day when we change our financial or tariff laws we ask "What will England think about it?" "How will Germany and France take it?" And the same questions are paramount in the cabinets and parliaments of Europe when new laws are considered there, all of which goes to show, so the author correctly argues, that mere local and national considerations are no longer exclusive motives for legislation, but that all countries are actually controlled by international considerations.

In the second part the author discusses the most visible symptom of the international policy of force which he justly characterizes as anarchy, namely the armaments. By reference to actual occurrences and events of recent history the important and burning problem of the reduction of armaments is discussed from the viewpoint of modern "pacifism" which strives to remove the causes rather than the consequences of friction.

The third part which is entitled "On the way to world organization" gathers a number of separate and distinct events of recent years, easily discernable as symptoms of a better international order, to make an ensemble picture which shows plainly the automatic development of international coöperation and of a general communion of the vital interests of all powers. The criticism passed upon the obstacles in the way of this evolution is a pacifist commentary on contemporary history and points to a gradual transformation from the old order to the new in the life of the nations of the world.

The book is the most comprehensive work of a talented and prolific author and, because of its unanswerable logic, is bound to make a profound impression in the country of militarism "par excellence." It is to be hoped that it will soon be available to English readers in an authorized translation.

RICHARD BARTHOLOMT.

Our Foreign Service. The A B C of American Diplomacy. By Frederick Van Dyne, LL. M., American Consul at Kingston, Jamaica, formerly Assistant Solicitor of the Department of State of the United States, author of *Citizenship of the United States*, *Van Dyne on Naturalization*, etc. The Lawyers' Co-Operative Publishing Co., Rochester, N. Y. 1909.

Mr. Van Dyne's new volume consists of 205 pages of text printed with wide margins and liberal spaces, of 77 pages of appendix containing: "Regulations governing examinations for the office of Secretary

of Embassy or Legation," "Present Diplomatic Service of the United States," "Regulations governing appointments and promotions in the Consular Service," "Regulations governing examinations," "Sample examination papers," "Present Consular Service of United States," "Forms."

This is followed by an index of 28 pages, mainly printed in capitals.

The preface points out that the act of Congress of 1906 placing appointments and promotions in the Consular Service "on a civil service basis" and the application of like principles to certain diplomatic appointments by presidential order of 1905, make possible attractive and honorable careers in our foreign service; that this book is designed for the general reader and for those desirous of entering the foreign service and those newly appointed thereto. The author hopes it may be found useful and interesting also to the legal profession and diplomatic and consular officers generally.

The text is divided into five heads dealing, first, with the Department of State; second, the Diplomatic Service; third, the Consular Service; fourth, Citizenship; fifth, the Literature of the Subject.

Mr. Van Dyne held first a clerkship and later the place of Assistant Solicitor in the Department of State from 1891 to 1907, when he was appointed Consul at Kingston, Jamaica. He was arbitrator in the claim of Solon vs. San Domingo and he is the author, as appears, of two books, one on Citizenship published in 1904 and one on Naturalization in 1907, and now, after two years, of the present work.

The writer of this review has read the text with care and interest. The long acquaintance of the author with the routine of the Department of State and of a consular office is apparent and these are valuable assets.

Mr. Van Dyne has given, as he evidently purposed and his title indicates, a very elementary account of the department and the foreign service. The book is evidently written *currente calamo* with very limited research. The statements are seldom supported by references and, if a reference is given, it is often too vague and general to be of use; page and volume are habitually omitted. Various anecdotes, often humorous and seldom new, are freely introduced. Some digressions are indulged which seem of little avail in a work of instruction as that on "Female Diplomats," page 74. The works referred to and quoted are often, though not always, of a light and popular character.

Some statements if not absolutely inaccurate are it seems slightly incor-

rect and misleading. Thus on page 40 we are told, "among our Secretaries of State who were particularly qualified by experience for the work of conducting our foreign affairs were the following: Thomas Jefferson, James Monroe, John Marshall, Lewis Cass, Elihu B. Washburne, each of whom represented the United States in Paris." Mr. Jefferson succeeded Franklin as our minister at Paris in 1785 and became Secretary of State in 1790. Monroe was named minister to France by Washington in 1794 and became Secretary of State in 1810. Marshall was minister to France in 1797 and became Secretary of State in 1800. Cass was minister to France for five years in the thirties and became Secretary of State in 1857 under Buchanan, retiring in 1860. Mr. Washburne however was appointed Secretary of State by his intimate friend, President Grant, at the beginning of the latter's administration, but resigned almost at once to accept the mission to France which he filled most efficiently during the Franco-Prussian War and through the time of the Commune. It is submitted that he ought hardly to be classified with those whose services as minister "qualified" them "by experience" for the Secretaryship as his diplomatic services were later in time than his services in the Cabinet.

The style of the book is highly colloquial and the author does not disdain such terms as "a good mixer" in speaking of the social qualifications of a diplomat.

The chapters give the impression of haste, as if compiled from notes gathered at random and with very limited time or labor, as a basis for lectures before classes of somewhat unsophisticated students. Yet it should be added that Mr. Van Dyne's long practical acquaintance with his subject and his frank and natural handling of it, his good sense, good temper and his facility make the work distinctly readable and undoubtedly valuable to beginners in this line.

The compilations in the appendix are convenient and some of them not easily accessible elsewhere.

The work seems worthy of a careful and severe revision, in which anecdote should be pruned and authenticated, exact citations habitually given, as in Mr. Van Dyne's earlier works, condensation, definiteness and authority sought for and the disposition toward expansion and popularity somewhat restrained.

Thus modified it might well become a lesser classic on a most interesting subject.

CHARLES NOBLE GREGORY.

L'ordine pubblico nel Diritto Internazionale. Andrea Rapisardi-Mirabelli. Catania (Niccolo Giannotta, Editore). 1908. L. 4.

This is a somewhat elaborate discussion of the place and meaning of the conception of "public order" in international law.

The general significance of the phrase as employed by the author can perhaps be best ascertained by reference to the preliminary articles of the Civil Code of Italy, which in this regard is followed closely in language and ideas by the Spanish and other civil law codes. In sections 7 to 11 the general rules are laid down which determine the law, national or foreign, to be applied; then follows section 12 with its exception. No foreign law or judgment and no private agreement is in any case to take effect when it conflicts with an Italian law that is prohibitory or which in any way touches *l'ordine pubblico e buon costume*. "Public policy and good morals" may not perhaps furnish an entirely accurate translation of either member of the phrase; taken as a whole it seems to cover pretty nearly the same ground.

It is then "public order," as a ground of exception to the logical and generally approved rules applicable to the solution of ordinary questions of private international law, that engages our attention.

The form in which the conception appears in the Codes is indeed in the author's view by no means accidental or meaningless, but indicates on analysis the position of these Codes in the development of law and their historical associations. And, on the other hand we might fairly say that the expression of the principle as found in his national Code has considerably influenced the attitude of mind with which the writer approaches the problem involved.

That problem, in a very few words, is the meaning and justification of such a class of exceptions. Upon what is it logically based? Does it represent an irreducible residuum that cannot be brought into a rational system, or is it possible to define and rationalize the exceptions, relating them to a higher unity? Have we in fact in this case what is really and properly to be described as a conflict of laws, in which the strongest, *i. e.*, that which has at its disposal the means of enforcement, wins; or is it still a matter of discovering and applying the proper law, though such law may, owing to special elements, differ from that applicable where no question of "public order" enters?

The historical aspect of the subject is treated at some length and not unprofitably, from the first faint shadowing of the doctrine which is detected in the theory of the real and personal statutes, to its definite

emergence in the pages of Savigny. So long as the territoriality of law was assumed as a principle, so long as and wherever conflicts were resolved or attenuated by means of the device of a voluntary and arbitrary comity, there was evidently little room for this conception. It was only when Savigny and his successors had reached the idea of a wide community of law existing among civilized nations, that anything resembling a system of private international law became conceivable, or that the residuum of unsolved conflicts which attach themselves to the public policy of the several nations, began to stand out in its real importance. The two ideas are bound together, and it is those writers (says the author in the last lines of his first chapter) who have contended most insistently for the international character of private international law, who have also sought for a criterion whereby to define the conception of "public order." These efforts, unremitting since the time of Savigny, to find an adequate and comprehensive definition, have ended consistently in failure. Others have sought rather to specify by enumeration the laws which fall under this heading. We meet utter confusion and uncertainty in what is pretty sure to be the first category, the laws relating to good morals. So absolute is the failure in this direction that certain authors have sought the remedy in a bold attempt to eliminate the conception of "public order" altogether. This may mean, in result, an abandonment of the conception of private international law, a return to the old idea of the *comitas gentium* — voluntary and arbitrary concession on the part of the national law; or again, it may be rather the name than the conception that disappears. And, finally, an overbold idealism may simplify conceptions by merely ignoring facts as they exist.

In none of these directions, then, is any true and satisfactory solution to be found, and we look to the author with considerable interest to discover what his own answer to the problem may be. The essential features of this answer, based largely upon the views and theories propounded by Jellinek, appear to be as follows:

The state does not, by the mere fact of its existence, possess any juridical personality. This it acquires only by becoming subject to the rule of law imposed by a superior will, which is to be found in the joint will of the states, realizing itself in the creation of regulations that govern mutual intercourse. But it is in the recognition of a state by its sisters that the rule imposes itself, that the state from being a physical entity becomes a subject of law. This recognition, it must be noted, is a mutual and bilateral act, not by any means the assumption by an existing

state or group of states of authority over the newcomer, but a mutual agreement by all concerned, implicit or expressed, to enter into a juridical relation.

Now this international recognition is accorded to the state *as a state*, in the fulness of its inherent functions and activities, subject only to the limitation that forbids trespass on the spheres of the other states. In a word, it is no series of rights and privileges that is recognized, but the simple right to be a state in relation with others. It is not the fundamental or essential rights of the state that demand to be defined, the important thing from the point of view of international law, the element that gives rise to the problems of international law, is the limitation of these rights.

It is, therefore, an error to place in opposition the international order and the personality of the individual state as if they represented conflicting modes of thought; on the contrary, it is the international order that guarantees this individual personality and its free development. From the mutual recognition of the states as legal personalities, free to realize themselves within the limits imposed by coexistence, we infer at once the rational system which impartially applies the national or the foreign law, and the sphere of the free will of the state which sets bounds to this system. The notion of public order, therefore, while still appearing as an exception to the rules ordinarily applicable, is nevertheless as truly as these rules themselves, a part of the general juridical order.

Finally, the sociological tendencies of the time are all in the direction of limiting and reducing the field of arbitrary freedom. This tendency may be expected to prevail in the domain of international law, and the sphere of the exceptions created on the ground of public order may be expected to diminish as time goes on; not, however, to the point of extinction, for the conception of individuality and personal freedom, for the state as for the man, is bound up with the constitution of the civilized world as we know it.

Such is the argument of Mr. Rapisardi-Mirabelli, as we understand it; and it must be said that it is not entirely convincing or satisfying. It would seem that he has hardly done himself full justice in the presentation of his views. In the historical part, interesting and valuable as it is, the thread of the thought is hard to follow as we pass from theory to theory, from subject to subject. If we have been at all successful in indicating the course of the author's thought, it will appear that his proposed reconciliation of the contending conceptions — the national or the

international law, public policy and national system — is rather verbal than real.

Of the highest interest, however, is the concluding chapter dealing with public order in treaty law, and particularly as it is affected by the several conventions that resulted from the Hague Conferences. In these conventions we find ample justification for the opinion expressed, that the field or conflict in private international law is likely to be reduced within comparatively narrow limits, at least so far as nations sharing a common inheritance of law are concerned, and we see some ground for hope that "public order" may in the course of time come to denote a very limited class of matters in which, by general agreement, the option if left with the individual state to apply the foreign law according to generally established international rules, or its own national law, as may best accord with public sentiment and the genius of its institutions.

JAMES BARCLAY.

A Handbook of Public International Law. By T. J. Lawrence, M. A., LL. D., 7th ed. London: McMillan & Co., Limited, 1909. pp. xvi, 189.

Dr. Lawrence's *Handbook of Public International Law* has more than justified its preparation, for it is already in the seventh edition. It is therefore so well-known as not to need extended comment, for it was and is the best brief digest of the subject. The book is, as Dr. Lawrence says, practically rewritten and is fully abreast of the latest developments. The great changes in international law brought about by the Hague Conferences and the Naval Conferences of 1908 and 1909 have been noted, and each section is supplied with carefully selected references which will enable the student to round out his knowledge of the subjects treated.

The sections on the Definition and Nature of International Law (Chapter I), the History of International Law (Chapter II), the Subjects of International Law (Chapter III), and the Sources and Divisions of International Law (Chapter IV) form an admirable introduction to the subject.

Brief as this book is, it is believed that its mastery would give the average reader a fair and clear conception not only of international law as a system, but considerable insight of the steps by which international law has grown to be what it is. The value of the work is enhanced by an index placing its contents at the disposal of the reader.

JAMES BROWN SCOTT.

International Incidents for Discussion in Conversation Classes. L. Oppenheim, M. A. LL. D. Cambridge: University Press. 1909. xi, 129 pp.

In the introductory paragraphs of the preface to his modest collection, Professor Oppenheim states the origin, purpose and limitation of this interesting little work:

For many years, he says, I have pursued the practice of holding conversation classes following my lectures on international law. The chief characteristic of these classes is the discussion of international incidents as they occur in everyday life. I did not formerly possess any collection, but brought before the class such incidents as had occurred during the preceding week. Of late I have found it more useful to preserve a record of some of these incidents and to add to this nucleus a small number of typical cases from the past as well as some problem cases, which were invented for the purpose of drawing the attention of the class to certain salient points of international law.

As I was often asked by my students and others to bring out a collection of incidents suitable for discussion, and as the printing of such a little book frees me from the necessity of dictating the cases to my students, I have, although somewhat reluctantly, made up my mind to publish the present collection.

The present reviewer has followed a somewhat similar method in the class-room and has spent a few minutes in each hour in informal discussion of various incidents taken from the current press. He has therefore read Professor Oppenheim's collection with the greatest of interest, and while a few of the incidents are old friends somewhat disguised, most of the cases are new, in the sense that they have occurred within the past few years, and actual, in the sense that they have been the subject of discussion in the press, while others would seem to be modelled upon actual incidents. Whatever their origin, they are all interesting and valuable, and there can be no doubt that the collection will serve a very useful purpose in the class-room, especially if international law is taught by the lecture or text-book system.

Professor Oppenheim has printed the text on writing paper and on one side of the page, so that ample space is left either for additional cases or for the annotation of the student. Some of the incidents are difficult and for their solution require no inconsiderable knowledge of international law, which in itself is a recommendation. Professor Oppenheim has wisely refrained from notes, annotations, or suggestions, so that the student is forced to rely upon his own knowledge and ingenuity. The collection, consisting of 100 incidents, is as useful as it is unpretentious and deserving of praise.

JAMES BROWN SCOTT.

The Great Design of Henry IV. Edited by Edwin D. Mead. Boston: Ginn and Company. 1909. xxi+91 pages. List price, 50 cents net, mailing price, 55 cents.

Whether or not *The Great Design of Henry IV* was in reality his work or the project of the Duke of Sully, from whose memoirs it is known, is a matter of controversy; but, whatever its origin and authorship, the *Great Design* has influenced thought and marks a date in the history and evolution of federation. Mr. Mead was therefore well-advised to undertake its publication in popular form and to make it the beginning of a series of monographs dealing with the subjects of federation, arbitration, and pacifism. It is well-known that William Penn refers to the *Great Design* in his plan for the perpetual peace of Europe as showing the feasibility of his own project, and it is common knowledge that Saint-Pierre's project of perpetual peace and Rousseau's famous essay are based upon the *Great Design* of Henry or his minister.

The appearance, therefore, of Mr. Mead's edition with its interesting introduction and Dr. Hale's paper on the *United States of Europe*, is of interest to the general reader for whom it is primarily intended, and the announcement that the *Great Design* is the first of a series of several volumes "devoted to the classics of the peace movement" such as the *Nouveau Cynée* and Kant's *Eternal Peace*, will be welcome to the large circle of intelligent readers and thinkers interested in the peace movement.

The book is properly kept within very small limits, the introduction is but 14 pages, the *Design* itself 51 pages, the related documents taken from Sully's *Memoirs* 23 pages (pages 54-76) and the *United States of Europe* by Dr. Hale 14 pages (pages 77-91), only a little over 100 pages.

It is suggested in no captious spirit that Dr. Hale's contribution does not add to the value of the publication, and it would seem that an introduction by the learned editor to the various volumes selected for publication would be sufficient to meet the need of the general reader, and that the views of commentators as to the value and importance of the texts selected would find a more appropriate place in the editor's introduction.

JAMES BROWN SCOTT.

Consular Cases and Opinions from the decisions of the English and American Courts and the Opinions of the Attorneys General. By Ellery C. Stowell, *Docteur en droit* (Paris), Graduate of the *Ecole Libre des Sciences Politiques*, Secretary of the College of the Political Sciences. Washington: John Byrne & Co. 1909. pp. xxxvi, 811.

In compiling this book Doctor Stowell has not only rendered a great service to the many young men who are pursuing courses of study in our colleges and universities with a view of entering upon a career in the consular service recently made possible by the application of civil service principles to appointments in that branch of the public service, but he has also provided a most useful reference book for consuls, lawyers and others who may be called upon to deal with problems connected with the exercise of consular functions. Any one who has had to refer to the decisions of the American courts upon consular questions can not but feel grateful to Doctor Stowell for making a laborious task comparatively easy.

Perhaps the best way to describe the book would be to follow the order of its arrangement. There are a list of abbreviations, alphabetical and chronological lists of cases, tables of judges and of the opinions of the Attorneys General, usually found in books of this character. The regulations of the Institute of International Law relating to consular immunities are given an appropriate place in the first part of the volume.

The American and British cases relating to consuls with the appropriate references to dates and the volumes in which reports of the cases may be found occupy the next 450 pages of the book.

The cases are followed by the opinions of the Attorneys General relating to consuls, chronologically arranged and supplied with very satisfactory synopses which aid materially in quickly ascertaining the purport of any opinion.

In addition, there have been included a useful subject analysis of treaties in relation to consuls to which the United States is a party, prepared by Mr. Woislav Petrovitch, formerly American Vice-Consul at Belgrade; an index to the Federal Statutes relating to consuls prepared by Messrs. Scott and Beaman, and a table of cases cited.

Besides a comprehensive index to the volume, Doctor Stowell has added a compendium, the purpose of which is to arrange under subject headings references to the pertinent cases and opinions somewhat in the manner of an index-digest. The compendium is one of the most practical and useful features of the book and enables one to see at a glance

precisely what cases the courts have dealt with upon any branch of the general subject.

In this connection one can not but regret that the compendium should have been limited to a brief statement of the point involved in each case to which reference is made. It would seem that the book would have been vastly improved if all the cases and opinions in their entirety had been arranged chronologically under the appropriate subject headings so that one endeavoring to find the law upon any branch of the subject might turn to the proper head and find thereunder all that had been said upon the point by the American and British courts and by the Attorneys General. The arrangement suggested would have been invaluable to the busy consul or professional man using the book occasionally to whom convenience is of prime importance.

It is also believed that the volume would have been much more useful had the author seen fit to supply in all cases a succinct statement of the facts, and a synopsis of the opinion of the court as well as the full opinion instead of limiting himself in a majority of instances to a brief statement of the holding of the court.

The volume is not designed to cover a much broader field than that covered by Doctor Stowell's first book on "Le Consul" and therefore does not include cases and opinions referring to the exercise of extra-territorial jurisdiction by consular officers. As the author intimates, this subject is really one deserving separate treatment and furthermore is likely to become less important as time goes on. Already within ten years this special jurisdiction has been abolished in Japan, Zanzibar, Samoa and Siam, and there are indications that the time may not be far distant when a similar change may take place in Turkey.

On the whole the book is creditable piece of work and one that can not but prove of great value to consuls as well as to students of consular affairs and to lawyers, who have hitherto felt the need of a compilation in convenient form of the information which this volume contains.

WILBUR J. CARR.

Letters to "The Times" upon War and Neutrality (1881-1909), with some Commentary. By Thomas Erskine Holland. Longmans, Green, and Co., 39 Paternoster Row, London: 1909. pp. xi, 166.

During the Civil War a series of letters, over the signature of Historicus, dealing with questions of belligerency, appeared in the *London Times*. They were written by the late Sir William Vernon-Harcourt while at the bar, who, yielding to the judgment of competent authorities,

published them in book form with considerable additions. As revised and enlarged they have not only taken a permanent place in international law, but may properly be considered classics.

The publication of Professor Holland's *Letters to the Times Upon War and Neutrality* suggests comparison with the letters of Historicus, and notwithstanding their brevity and casual origin, they stand the test.

Professor Holland's letters were regarded at the time of their publication as contributions to international law. As such they were quoted by writers on international law, and in the Second Hague Peace Conference Professor Holland's letters to the *Times* dealing with the destruction of neutral prizes were cited as "the opinion of one of the most celebrated contemporary writers on international law" (*Deuxieme Conférence Internationale de la Paix, Actes et Documents*, Vol. 3, pp. 992-993, 1048); and two of the letters, dated respectively August 17th and August 30th, 1904, were presented by the German delegation as the authoritative statement on the subject and as such are printed in the proceedings of the Conference (*Ibid.*, pp. 1171, 1172).

Professor Holland was therefore well-advised to reprint his various letters to the *Times* and to furnish them with an adequate commentary.

A careful reading of these letters shows them to have permanent value, for they not only state within the narrowest compass the international law at the time of writing, but indicate at one and the same time the tendency and line of future development, and it must be a source of gratification to Professor Holland to see that his various suggestions and predictions have been justified by the action of international conferences. By way of a concrete example, the series of letters on the naval bombardment of open coast towns, pages 73-85, may be selected, for Professor Holland's views on this subject have not merely been adopted by the Institute of International Law, but substantially incorporated in the Hague convention of 1907 respecting bombardments by naval forces in time of war.

JAMES BROWN SCOTT.

Diplomatic Memoirs. By John W. Foster, author of "A Century of American Diplomacy," "American Diplomacy in the Orient," "The Practice of Diplomacy," etc. Boston and New York: Houghton Mifflin Company. 1909. 2 Vols. Illustrations.

General Foster has at least five separate careers, any one of which would have rounded out the life and satisfied the ambition of an ordinary man. His service in the field during the Civil War was distinctly

creditable to him as a man and a soldier and of value to the country. His rich and varied experience in practical diplomacy in Mexico, Russia and Spain was equally valuable to the countries to which he was accredited as well as to the United States which he had the honor to represent. As legal adviser to China after its disastrous war with Japan and his active participation in negotiating the terms of peace of Shimonoseki, he rendered inestimable service to China and enhanced the prestige of the United States in the Far East. As Secretary of State at the close of President Harrison's administration he cleared off the arrears of business, having, as he says with just pride, acted upon every pending question before the Department ripe for settlement.

As an international lawyer he has an enviable reputation, for he has appeared as agent of the United States in the Bering Sea Arbitration and in the Alaskan Boundary case. In addition he has pressed to a successful conclusion various claims against the United States placed in his hands, and he has been at all times a safe and trusted counselor of various foreign legations at Washington. Finally, and as a mere incident in a busy career, he has won no little recognition as a writer on subjects connected with international law and diplomacy. His "*Century of American Diplomacy*" (1900), his "*American Diplomacy in the Orient*" (1903), his "*Arbitration and the Hague Court*" (1904), his "*Practice of Diplomacy*" (1907) are standard books, and his "*Diplomatic Memoirs*," published in the present year, will undoubtedly enhance a reputation already high. It should be mentioned in passing, as an indication of General Foster's modesty, that he does not refer to his literary career, although he refers in one instance for details to his "*American Diplomacy in the Orient*."

General Foster has entitled the work under review *Diplomatic Memoirs*, and has therefore excluded from his long and busy career episodes which would have been interesting to a wide circle of readers. For example, he barely mentions his career before 1872 when he was appointed American Minister to Mexico, and dismisses his early career with a few paragraphs on his ancestry, his education, his career in the army (Vol. 1, p. 9) and his experience in Indiana politics.

General Foster was appointed to the diplomatic service without any special qualifications, but like so many others selected from private life, he amply and immediately justified the choice. As the result of a lifetime's experience, General Foster is convinced that the diplomatic service should be recognized so as to be made a regular career and expresses his conviction in the following measured language:

I am a strong advocate for the establishment of a regular career for the diplomatic service of the United States; I would have all Secretaries of Legation enter the service through a competitive examination; continue in office during good behavior; and, as they should prove worthy, have them promoted to Ministers. But I doubt whether the time will ever come when our Government will think it wise to confine the appointment of Ministers and Ambassadors entirely to promotions from the posts of Secretary. It has never been so in the Governments of Europe where the regular diplomatic career has long been an established system. Many of their most useful and distinguished diplomats have been those who have entered the service through a competitive examination, but who were appointed from other branches of the public service or from private life. (Vol. I, pp. 12, 13.)

The Executive Order of President Taft, issued upon the recommendation of Secretary Knox (see Editorial Comment, p. 173, and Supplement, p. 99) is a confirmation of the soundness of General Foster's views.

As Minister to Mexico (1873-1880), General Foster had the great advantage of seeing our sister republic pass through the critical stage of revolution to assume an honored and respected place among the family of nations under the firm hand of General Diaz. He describes from the standpoint of an observer conditions as he found them (pp. 15-149); he appreciates the participants in the great struggle and sums up the result of Mexican activity in the following passage:

When Diaz assumed control of affairs, the financial situation of the country could hardly have been more desperate. No interest on its public debt had been paid for many years. Its bonds had no value at home or abroad, and were not quoted in the money-market of a single city of the world. But the financial improvement which Diaz inaugurated soon began to create confidence among foreign capitalists, and the rapidly growing revenues finally enabled Señor Limantour, the able Secretary of Finance, to reestablish the Government credit. The foreign indebtedness of every character, whose legitimacy could be shown, was funded, first into gold bonds at six per cent, afterwards at five per cent, and later at four per cent, until the credit of Mexico became equal to that of some of the first Powers of Europe and much above that of any other of the Latin-American Republics. (Vol. I, p. 114.)

The success, however, of the Diaz régime has not blinded General Foster to the dangers of the system, as is evident from the following appreciation and criticism of the Mexican President:

During those years the country has enjoyed unparalleled prosperity, and it was natural that the inhabitants who had been so greatly benefited by his administration should wish to continue him in power. But I regard it as mistaken statesmanship to have so long yielded to their desire. In reviewing the history

of Mexico and the other independent Spanish-American States we have seen that the chief cause of their frequent revolutions has been the effort to change their presidents. The transfer of the administration by the peaceful and constitutional methods has proved in many instances a failure. This has been the case particularly in Mexico.

It would have been a wise and patriotic act for General Diaz to have retired from the Presidency at the end of his second term, leaving the prohibitive clause of the Constitution in force. He would then have been in a position to guarantee a peaceful election of a successor and a continuance of the good order and prosperity which he had established. The people also might have had an opportunity to test their ability to conduct a government by means of a free and untrammelled exercise of the electoral franchise, a condition as yet unknown in Mexico. The benevolent autocracy under his administration has resulted in great prosperity for the country, but it has done little to educate the masses of the people in their duties under a republican government. (Vol. I, pp. 106, 107.)

His first mission to Russia (1880-1881) was of short duration, but he was brought into intimate contact with the resident diplomats at the Russian court and was present at the assassination and burial of Alexander II. His chapters on Diplomats and the Russian Court (pages 150-162), Russian Affairs, Political and Social (pages 163-180), the Assassination of Alexander II (pages 181-197), Russia under Alexander III (pages 198-215), his second mission to Russia in 1897 in relation to the Fur Seal controversy (pages 216-238), are marked by a keen observation, justness and breadth of view, and his comments upon the Czars, the court and ruling classes are as sagacious as they are interesting.

General Foster resigned from the diplomatic service in 1881 to take up the practice of international law at Washington, but he was persuaded by President Arthur to accept the mission to Spain (1883-1885), and he later visited Spain in 1891 in connection with reciprocity treaties. His familiarity with Spanish, obtained by a long residence in Mexico, his understanding of the Spanish life and character, have enabled him to give a singularly vivid and sympathetic account of modern Spain, and it is perhaps not too much to say that the chapters devoted to Spain (pages 239-333) are the most interesting of this singularly attractive book. The reviewer calls especial attention to the chapter on Statesmen and Diplomats at Madrid (pages 261-275) in which General Foster gives an admirable sketch of Canovás, Sagasta and Castelar, and the curious and impressive Spanish ceremonial of "Holy Week" (pages 314-328).

The second volume contains many matters of great importance written

by one who played no small part in them, such as the Reciprocity Negotiations (pages 1-19), the Bering Sea Arbitration (pages 20-50), the Alaskan Boundary Settlement (pages 191-210), the Annexation of Hawaii (pages 166-175), Canadian Affairs (pages 176-190), the Second Hague Peace Conference, at which General Foster represented China and of which he gives valuable and interesting chapters on its organization and results (pages 211-241).

The most interesting chapters in this volume are undoubtedly those devoted to "Presidents under whom I served" (pages 242-258) and the "Secretaries of State" (pages 259-280). The most valuable portion of the work undoubtedly is the series of chapters dealing with China and Japan (pages 90-165), in which General Foster, with modesty and reserve, describes the course of the negotiations which put an end to the unfortunate war between China and Japan, and sets forth as only a participant could the issues in the balance and the means by which peace, honorable to both nations, was secured. These chapters are not merely interesting, well written and carefully balanced, but they are a distinct contribution to the history and diplomacy of the Far East. They show not merely the resourcefulness of General Foster, but they show him possessed of that balance and solidity of judgment which are the characteristics of true greatness.

It would be interesting to quote from the chapters on the Presidents and Secretaries of State, for in these General Foster has expressed, apparently without reserve, his opinions of the Presidents and Secretaries with whom he came into contact. It is feared that the relatives of some of the deceased will wish that General Foster had maintained more of the reserve so usually characteristic of diplomacy, but the student of public affairs will be glad that General Foster has preferred the truth as he sees it. As Secretary of State he considers Seward entitled to grateful remembrance. "Judged by his achievements and his despatches, he must be regarded as the first Secretary during the last half century." (Vol. II, p. 259.) He considers Hamilton Fish as competent but not brilliant, William M. Evarts as a brilliant lawyer out of place in the Department, and among recent Secretaries regards the late John Hay as the most gentle, lovable and broad-minded in character and as having rendered the greatest services to his country. Mr. James G. Blaine is frequently mentioned, always with respect, and while General Foster appreciates his brilliancy and dash, he is not blind to his faults, which were many and serious.

Of a personal nature are the chapters describing the tour around the world, Syria, Egypt, India, China and Japan (pages 51-89), chapters enlivened by personal letters to General Foster's daughters by Mrs. Foster without thought of publication. The chapter on International Law Practice (pages 281-302) will have especial interest to international lawyers.

The two volumes, briefly and inadequately passed under review, are a genuine contribution to diplomacy and diplomatic history. They are free from partisanship and bias, they aim to and do actually set forth the great events with which General Foster was connected, and are marked by a delightful and ever-present modesty and self-effacement. The concluding sentences are at once a sample of the author's reserve and of the spirit which has animated his entire life:

"I have been highly honored," he says, "by my country with many important public trusts, but I have the consciousness of having earnestly striven to discharge them faithfully. The retrospect of a life of more than threescore years and ten occasions much satisfaction and little regret, thanks to a kind Providence, a favoring Government, and a host of friends."

Various reports which General Foster prepared from time to time were printed as public documents and had a large circulation, and not a few addresses of his delivered before learned and scientific bodies have been widely read and appreciated. The reviewer ventures the suggestion that General Foster might well collect in permanent book form his most important reports and addresses dealing with questions of public law, and thus round out an honorable and distinguished literary and public career.

JAMES BROWN SCOTT.

PERIODICAL LITERATURE OF INTERNATIONAL LAW

(For list of abbreviations used, see Chronicle of International Events, p. 191.)

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THE ARCTIC AND ANTARCTIC REGIONS AND THE LAW OF NATIONS

The announcement of the discovery of the North Pole raised in several quarters, among others the British and the Canadian Parliaments, the question whether the act of discovery gave to the United States any right of possession over the North Pole.

In searching for the answer to this question, it is necessary to ascertain the rules of the Law of Nations that govern analogous cases.

What was previously presumed, proved to be correct, that at the North Pole there is no land, but only ice resting on the deep sea, and in order to reach the Pole, it must be approached for a long distance over the ice resting on the deep sea.

What is the law applicable to the sea? Originally formulated by Queen Elizabeth, and more fully expounded by the Hollander, Hugo Grotius, the freedom of the high seas was controverted in the reign of Charles the First by the publication of the treatise *Mare Clausum* written some years before by England's ablest jurist of that time, John Selden.¹

At various times all or almost all the nations of the world have taken a hand in the controversy of the freedom of the high seas. And each state has argued on the side that at the time seemed best for its own individual interests. But in the long run the family of nations has pronounced without equivocation in favor of the freedom of the seas. Naturally if the North Polar Sea were open there would be no question of its being as free as any part of the broad Atlantic and Pacific Oceans.

The North Polar Sea, however, is covered with ice. Ice, unlike the water of the high seas, is a solid substance upon which mankind

¹ Walker: A History of the Law of Nations, Vol. I, p. 161; Oppenheim: International Law, Vol. I, p. 303.

can build habitations and live for an indefinite period of time. Thus during the Russo-Japanese War, the Russians built during the winter seasons a railroad on the ice over Lake Baikal and established a station mid-way across the frozen lake. And over that piece of railroad they forwarded many thousands of men and great quantities of stores and implements of war. In that sense it might be urged that men might permanently occupy the ice cover of the Polar Sea. But the ice at the North Pole is never at rest. It is in continual motion. It moves slowly in a direction from Bering's Strait towards the Atlantic Ocean. Consequently any habitation fixed upon it would be continually moving. And such possible occupation would be too precarious and shifting to and fro to give any one a good title. And so the rules of the Law of Nations that recognize the freedom of the high seas, would seem to apply naturally to a moving and shifting substance like the North Polar Sea ice at all points beyond the customary three-mile limit from the shore.

In the Antarctic, however, conditions are different from the Arctic. For in the former area, the South Pole and the region around is covered not by a deep sea as at the North Pole, but by land. This land, whose continental proportions were first made known to the world by the discoveries of Commodore Charles Wilkes of the American Navy, is being explored bit by bit by men of many nations.² In this work of discovery many Americans besides Wilkes, such as Palmer and Pendleton, have had an active share. Naturally whatever claim of priority of discovery is due to the work of these Americans redounds to the advantage of our country.

But discovery alone is not sufficient to give a good title to a new, unoccupied land. The custom among nations for centuries, that gradually crystallized into a part of the Law of Nations, is that in order to perfect the right given by discovery, it must be followed by occupation.

Queen Elizabeth, in a famous reply to Mendoza, the ambassador of Philip the Second of Spain, took the view that discovery must be

² Edwin Swift Balch: *Antarctica*.

followed by effectual occupation to give a good title of possession. The Queen said,³

she did not understand why either her subjects or those of any other European Power should be debarred from traffick in the Indies: that she did not acknowledge the Spaniards to have any title by donation of the Bishop of Rome, so she knew no right they had to any places other than those they were in actual possession of; for their having touched only here and there upon a Coast, and given names to a few rivers and capes, were such insignificant things as could in no ways entitle them to property (*proprietas*) further than in the parts where they actually settled and continued to inhabit.

In this view of the rules of the Law of Nations, Spain later eventually concurred. During the controversy over Nootka Sound, in a declaration on the 4th of June, 1790, signed by Count de Florida Blancas, that he sent to the courts of Europe, the King of Spain said that he limited his claims to

the continent, islands and seas which belong to His Majesty, so far as discoveries have been made and secured to him by treaties and immemorial possession, and uniformly acquiesced in, notwithstanding some infringements by individuals who have been punished upon knowledge of their offences.⁴

Mr. Westlake, who held the Whewell Chair of International Law at Cambridge University from 1888 to 1908, sums up the idea of title by discovery that was held when the new world was being discovered. He says,⁵

it was not imagined that any title could be gained by a discovery made by subjects without authority from their governments. The title, though for shortness it might be spoken of as one by discovery, was always understood to be one by discovery and occupation, and occupation, with the consequent acquisition of dominion, could in the nature of things be only the act of a state.

In the Antarctic Continent none of the nations who can bring forward the claim of discovery to various parts of that continent, have as yet perfected, or even attempted seriously, owing to the

³ Camdeni Annales, Anno 1580: tr. in Twiss's Law of Nations, p. 208.

⁴ Cited by Westlake: International Law, Pt. I, p. 103.

⁵ *Ib.*, p. 99.

immense impeding power of nature, to perfect their respective titles of discovery by effective occupation. The English have attempted recently a sweeping annexation of much of West Antarctica (which they call Graham Land) and the adjoining groups of islands. By letters patent published in July, 1908,

the groups of islands known as South Georgia, the South Orkneys, the South Shetlands, and the South Sandwich Islands, and the territory known as Graham Land [that is the continental land mass directly south of Chili and Argentina], situated in the South Atlantic Ocean to the south of the fiftieth parallel of south latitude and the eightieth [sic] degree of west longitude,

are declared to be dependencies of the Falkland Islands and to be within the jurisdiction of the Governor of those islands.⁶ Commenting on this attempted act of annexation of many islands and a vast tract of land that have always been regarded as not belonging to any one, a writer in the *Scottish Geographical Magazine*⁷ says:

Of these islands South Georgia has for long been a dependency of the Falklands, having been annexed by Britain in 1775. But the South Shetlands were at one time, at least nominally, claimed by the Argentine Republic, and the same country, it must be remembered, makes use of the South Orkneys for the meteorological observatory which they took over from the *Scotia* and still maintain. The South Sandwich Group is still unexplored, though it is, or until recently undoubtedly was, visited by sealing schooners. This annexation of part of the Antarctic regions is the first attempt to lay serious claim to what was previously no-man's land. It no doubt arises from the fact that these waters are now visited by a number of whalers who are making shore stations, such as at Deception Island, and South Georgia. A whaling station is also to be established on New Island, a small island of the Falkland Group. A whaler has now to pay an annual license at the Falkland Islands to be allowed to fish in these waters and to make use of the harbors of the islands.

The English in their attempted wholesale annexation have included Deception Island close to the continental mass of West Antarctica. But Norwegian and Chilian whalers are actively using the same island and harbor as their base for the whale fishery. On December 24, 1908, Dr. Charcot, commander of two French antarctic expedi-

⁶ The *Scottish Geographical Magazine*, August, 1909, pp. 435-436.

⁷ August, 1909.

tions, reports that about two hundred Norwegian citizens and some Chilians were using Deception Island as their base in their quest for whales.⁸ The active use by citizens of two nations, one a neighboring South American state, of this island that has been from time immemorial a part of no-man's land saves for the world at large the rights of all of the family of nations to participate in the bounties of nature around Deception Island. But even supposing that Great Britain had established a good possession, through occupation, to Deception Island, the possession of that island would not give her possession of the continental mass of land directly south of South America. In that land mass, known in part as Palmer Land, Graham Land, Danco Land, etc., and often designated as a whole as West Antarctica, no power has as yet established an effective occupation. Deception Island is first spoken of by the American sealer, Fanning, as being used by American sealers as a harbor of refuge, under the name of "Yankee Harbor."⁹ Even if Norway and Chili through the actual use of that island by their whalers did not preserve it for the family of nations as a common possession of all mankind, and so block the claims of any one Power to the possession of all of West Antarctica, yet for Great Britain to now assert that she has obtained by her proclamation of July, 1908, possession of West Antarctica,¹⁰ the continental land mass lying south of South America, would cause her to run counter to her own interpretation of the Law of Nations in respect to what effects possession, from her great Queen Elizabeth to one of her greatest living international jurisconsults, Westlake. So, too, the best opinion of the international jurisconsults of other lands are against her.

Vattel says:¹¹

All mankind have an equal right to things that have not yet fallen into the possession of anyone; and those things belong to the person who first takes possession of them. When, therefore, a nation finds a country

⁸ *Ib.*, June, 1909, pp. 326-327.

⁹ Fanning: *Voyages Round the World, etc.*, pp. 434-440; Edwin Swift Balch: *Antarctica*, p. 86 *et seq.*

¹⁰ *The Scottish Geographical Magazine*, August, 1909, p. 436.

¹¹ Vattel: *The Law of Nations*, tr. by Chitty, p. 98.

uninhabited, and without an owner, it may lawfully take possession of it: and, after it has sufficiently made known its will in this respect, it cannot be deprived of it by another nation. Thus navigators going on voyages of discovery, furnished with a commission from their sovereign, and meeting with islands or other lands in a desert state, have taken possession of them in the name of their nation: and this title has been usually respected, provided it was soon after followed by a real possession.

But it is questioned whether a nation can, by the bare act of taking possession, appropriate to itself countries which it does not really occupy, and thus engross a much greater extent of territory than it is able to people or cultivate. It is not difficult to determine that such a pretension would be an absolute infringement of the natural rights of men, and repugnant to the views of nature, which, having destined the whole earth to supply the wants of mankind in general, gives no nation a right to appropriate to itself a country, except for the purpose of making use of it, and not of hindering others from deriving advantage from it. The law of nations will, therefore, not acknowledge the property and sovereignty of a nation over any uninhabited countries, except those of which it has really taken actual possession, in which it has formed settlements, or of which it makes actual use. In effect, when navigators have met with desert countries in which those of other nations had, in their transient visits, erected some monument to show their having taken possession of them, they have paid as little regard to that empty ceremony as to the regulation of the popes, who divided a great part of the world between the crowns of Castile and Portugal.

On this point Klüber says:¹²

The occupation of an uninhabited and ungoverned part of the globe of the earth cannot therefore extend except over the territories of which effective possession, with the intention of taking the proprietary right, is constant.

Ortolan maintains:¹³

Taking a nominal possession, a sign or some index of sovereignty does not suffice. * * * There must be added to the intention * * * an effective possession, that is to say, that one must have the country at one's disposition and have done there work which constitutes an establishment.

The Swiss-German jurist, Bluntschli says:¹⁴

278. The sovereignty of the territories that do not form a part of any State is acquired by the taking possession of these by a given State.

¹² Klüber: *Droit des Gens moderne de l'Europe*: edited by M. A. Ott, p. 177.

¹³ Ortolan: *Des Moyens d'acquérir le Domaine International*, cited by Westlake, *International Law*, Vol. I, p. 110.

¹⁴ Bluntschli: *Le Droit International Codifié*, tr. by M. C. Lardy.

The simple intention to take possession, and even the symbolic or formal expression of this intention, as also as a taking a provisional possession, are insufficient.

281. No State has the right to incorporate with itself more territory, uninhabited or inhabited by barbarous tribes, than it can civilize or that it can organize politically. The sovereignty of the State exists only if it is exercised as a fact.

In a note to article 281, Bluntschli says:

The principle of occupation is based uniquely on the fact that men are, by nature and destination, called to live in a state of society and to organize into States. But when a power, as for example England in America and Australia, as Spain and Portugal in South America, as the Netherlands in the islands of the Pacific Ocean extends its pretended sovereignty over immense spaces, inhabited or occupied by savages, and can, in reality, neither cultivate nor govern these territories, that State does not march towards the aim of humanity; it retards on the contrary the realization of that object, by preventing other Nations from establishing themselves in those countries or new States to organize therein. There is not a true occupation except when it is real and durable; temporary or symbolic occupation can only create a factitious right. A State does not, therefore, violate International Law in seizing a country of which another State only took formal possession at an earlier period. There can easily result therefrom conflicts, but the question of right is settled beforehand, politics alone are at stake.

Concerning the validity of the title to a newly occupied land, the late distinguished Russian international publicist, Fedor de Martens, holds ¹⁵

In order that an occupation may be valid, as a means of acquiring an international property, the following conditions must be fulfilled:

1. From the subjective point of view, it is necessary that the occupation is accomplished (*ait lieu*) in the name and with the assent of a government. If it is effected by functionaries, representing a State, there is not any doubt as to the Nation that must be considered as proprietor of the occupied land. The occupation undertaken by private individuals must be sanctioned by the government to whose advantage it has been accomplished.

2. The occupation is effective if the State that has undertaken it is resolved to submit to its power the territory that it has discovered, occupied and annexed. This resolution (*animus possidendi*) manifests itself externally by the national flag, arms and other symbols, but especially, by the material occupation of the newly discovered land, the

¹⁵ de Martens: *Traité de Droit International*, tr. by Alfred Léo: Vol. I, p. 463.

introduction of an administration, the dispatch of troops, the construction of fortifications, etc.

3. One can occupy only lands that belong to no one and inhabited by barbarous tribes. * * *

4. The limits of the occupation are determined by the material possibility to cause to be respected the authority of the government throughout the extent of the occupied country. There where the power of the State does not make itself felt, there is not an occupation. In order that it may be effective, it must receive its entire execution.

The German jurist, Dr. von Holtzendorff, says:¹⁶

No State can appropriate more territory through an act of occupation than it can regularly govern in time of peace with its effective means on the spot.

Westlake quotes with approval the declaration on this subject adopted in 1888 at Lausanne by the Institute of International Law. That body of scholars versed in the Law of Nations recommended as an international declaration concerning the occupation of territory the following articles:

Art. 1. The occupation of a territory by right of sovereignty can not be recognized as effective unless it unites the following conditions:

1st. Seizing possession of a territory contained within given limits, in the name of a government.

2nd. Official notification of the seizure of possession.

Seizure of possession is accomplished by the establishment of a responsible local power, endowed with means sufficient to maintain order and insure the regular exercise of its authority within the limits of the occupied territory. These means can be borrowed from institutions existing in the occupied country.

The notification of seizure of possession is accomplished either by the publication according to the form that in each State is customary for the notification of official acts, or by the channels of diplomacy. It will contain the approximate determination of the limits of the occupied territory.

The Argentine jurist Calvo, says:¹⁷

Even in the case of the occupation of countries still in a savage state, the right of States to incorporate a greater territory than they can civilize or administer is contested.

¹⁶ Holtzendorff: *Handbuch des Völkerrechts*: Vol. II, p. 263.

¹⁷ Calvo: *Le Droit International Théorique et Pratique*: cinquième ed., Vol. I, p. 409.

The German juris-consult, Dr. Geffcken, speaking of the Congo Free State, says:¹⁸

It is a very doubtful question whether the Congo State can rightfully claim the sovereignty over a territory of more than 2,000,000 square kilometers with 40,000,000 inhabitants, extending in part over regions entirely unexplored and certainly not yet reduced into possession, even though its right to those limits has been acknowledged by other states. These regions will only become the territory of the Congo State in proportion as they are occupied by it.

Westlake after quoting in the first volume of his treatise, *International Law*, the above passage of Geffcken, approves of it as sound doctrine in these words: "This seems to us to have been a sound opinion."¹⁹

Oppenheim, Westlake's successor in the Whewell chair of International Law in Cambridge University, but a Continental jurist by birth and training, says:²⁰

It is agreed that discovery gives to the State in whose service it was made an *inchoate* title; "acts as a temporary bar to occupation by another State" within such a period as is reasonably sufficient for effectively occupying the discovered territory. If such period lapses without any attempt by the discovering State to turn its *inchoate* title into a *real* title of occupation, such inchoate title perishes, and any other State can now acquire the territory by means of an effective occupation.

* * * * *

Since an occupation is valid only if effective, it is obvious that the extent of an occupation ought only to reach over so much territory as is effectively occupied. In practice, however, the interested States have neither in the past nor in the present acted in conformity with such a rule; on the contrary, they have always tried to attribute to their occupation a much wider area. * * * In truth, no general rule can be laid down beyond the above, that occupation reaches as far as it is effective.

Since by the Law of Nations in order that a Nation may appropriate a newly discovered land it must obtain possession of that land by an effective occupation, the recent annexation for the British

¹⁸ Heffter, ed. by Geffcken; *Das Europäische Völkerrecht der Gegenwart*, 8th ed., p. 159, note 3.

¹⁹ Westlake: *International Law*, Pt. I, p. 109.

²⁰ Oppenheim: *International Law*, Vol. I, p. 278.

Empire of parts of East Antarctica, including the South Magnetic Pole, by the British expedition led with so much courage and foresight by Lieutenant (now Sir) E. H. Shackleton,²¹ does not give title to that newly discovered land in the absence of an actual occupation by British authorities any more than the annexation by Sverdrup for Norway of some of the land that he was the first to explore far to the north of the possessions of the Dominion of Canada.²²

While there is no immediate prospect that man will be able to harness nature even in part in the Antarctic Continent; still, owing to continued discoveries in the world of physical sciences, he may some day be able, in order to draw upon the mineral deposits of that region, to establish himself on the ice and snow covered South Polar land. With such a possible future contingency, it would seem that it would be well to follow the rule adopted in the case of Spitzbergen. In that cluster of northern islands, a few hardy pioneers — Americans, Norwegians, Danes, English, Russians and others — have established themselves for the summer or the winter season,²³ and two mining enterprises are now carried on there.²⁴ But, unlike the case of Greenland, where Denmark, not only through long occupation by her citizens but also by the exercise of her sovereign authority, has made the land hers by effective possession, no nation has successfully asserted a claim to the possession of the Spitzbergen archipelago. On the contrary those islands have come to be regarded as a joint possession of all mankind. And with this liberal end in view, the Government of Norway has invited the Governments of the other nations, some of whose citizens have sought Spitzbergen as a place for commercial gain, to send delegates to a conference to be held at Christiania this year to arrange for the application of civil

²¹ Shackleton: *The Heart of the Antarctic Continent*, Vol. I, p. 343, Vol. II, p. 181.

²² Axel Heiberg Land, King Oscar Land, Amund Ringnes Land and Ellef-Ringnes Land, were the newly discovered lands that the Norwegian expedition commanded by Sverdrup annexed. Sverdrup: *New Land*, Vol. II, p. 449.

²³ Greely: *Handbook of Polar Discoveries*, pp. 48-60, *passim*.

²⁴ Scott: "Arctic Exploration and International Law," *THE AMERICAN JOURNAL OF INTERNATIONAL LAW*, October, 1909, p. 941.

law and order to Spitzbergen.²⁵ On general principles it would seem that both East and West Antarctica, two lands so much more difficult for man to occupy than Spitzbergen, should, following the liberal policy that has come to prevail in the case of Spitzbergen, become common possessions of all of the family of nations.

THOMAS WILLING BALCH.

²⁵ Ibid, p. 941.

THE CRETAN QUESTION

The island of Minos, which at one time is supposed to have had the great honor of giving hospitality to Zeus or Jupiter during his infancy, thereby linking its name with that of celestial beings, seems to have been predestined by the Mœræ or Fates to be the perennial apple of discord between the descendants of 'Europa' the wife of the Supreme Olympian God.

There is so much confusion about its present condition and so many perplexing questions as to its actual *status*, that the diplomats in whose hands its destinies are intrusted, might possibly again need the clue or thread of Ariadne to find their way out of this Cretan labyrinth of modern times.

Conquered and reconquered at various times by alien nations, kept in bondage for centuries by the mercenary and unscrupulous Venetians, and held in serfdom by religious fanatics, such as Arabs and Turks, the former impressing upon them the necessity of union with the See of Rome as the means both for their earthly and heavenly salvation; the latter pointing the faith of Mohammed, in order to attain the same end, but with far more brilliant results; oppressed both by the disciples of Christ and those of Mohammed, compelled to abjure their religion, at one time for the sake of the one, at another for that of the other faith, the Cretans are, what they were three thousand years ago, a branch of the Hellenic nation, and their island, the pearl of the Mediterranean, purely a Greek island, having never divested itself of its Hellenic soul.

Hence the main reason for its troubles; hence the sufferings of its inhabitants for so many centuries; hence its political entanglements.

Europe, having at the time of the creation of the Hellenic Kingdom, made the initial mistake of leaving Crete under the Turkish yoke notwithstanding the participation of the islanders in the war of Greek independence, is now trying, half-hearted, to repair the wrong done by its statesmen at that time.

Nor was the island profitable to the Ottoman Empire itself, on account of the frequent risings and insurrections of the people, taxing heavily on the already impoverished Turkish exchequer, not to say anything of the losses and sufferings undergone by the Cretans and Turks during the long struggle of independence on one side and supremacy on the other side.

After the insurrection of 1863-1866, which rising had evoked so much enthusiasm both in Europe and in the United States, the Cretans hoped for a moment that their ideal would be realized, on account of the inclination of the then reigning Sultan to abandon "the ungrateful infidels," but unfortunately Great Britain and Napoleon III. vetoed the plan, leaving Crete again in bondage, with a grant of an illusory autonomy.

During the Russo-Turkish war of 1876-1878 the islanders raised again the standard of rebellion, this time with great success. Therefore the Congress of Berlin of 1878 taking notice of that fact, inserted a clause in the treaty bearing the name of that city, dealing with the autonomous regime of the island (which, it should be noted, was to be extended to the European provinces of Turkey), but the Sultan set at rest both plans by instituting a military government in Crete and shelving the other entirely, much to the merri-ment of the European chancelleries.

This naturally gave rise to further troubles and rebellion in the island and to repressive measures by the Porte accompanied by massacres on "a small scale," culminating in 1897 in the forcible intervention of Greece in the island, which enterprise met the disapproval of the European Concert and particularly of Emperor William of Germany, the then friend of the Sultan Hamid.

Therefore in a collective note, the six great Powers of Europe informed Greece that "Crete could not at present be annexed to the Hellenic Kingdom," but that they would confer on the island "an absolutely effective autonomous regime insuring for it a separate government under the high suzerainty of the Sultan."

On the occupation of the island or of its sea-coast towns by the international troops, which was done with the consent of Turkey, a proclamation referring to the grant of autonomy was issued by the

European admirals, to whom the government of the country was intrusted. Therefore the Cretan Assembly adopted a constitution of the island on the lines indicated in the proclamation, which met with the approval of the Powers.

After the Greco-Turkish war of 1897 and the forcible ejection of the troops of the Sultan from the island, on account of the massacres at Candia and particularly of the murder of British soldiers by the Turks, the four protecting Powers (Prince Bülow having in the meantime withdrawn "with his flute from the Concert," dragging also Austria with him), at the suggestion of Russia, appointed Prince George of Greece as their High Commissioner to govern the island in *lieu* of the admirals.

That step was taken against the will of Turkey, the Powers claiming to have the right of delegating their authority to whomever they pleased. As a matter of fact Prince George was not governor of the island, but only a delegate of the Powers.

Now the question may be asked what was the *status* of Crete, after that arrangement. Did she become a semi-sovereign state?

De jure, the island was only an autonomous Turkish province, because the Sultan had not consented to make Crete a separate state, and the Powers left that point unsettled.

But *de facto* and tacitly the island acquired the attributes of a semi-sovereign state, under the suzerainty of the Sultan, being temporarily placed under the protection of the four Powers.

In fact, in 1900 the Powers concluded a convention or an agreement with the Cretan Government in regards to the application of the capitulations in the island; and, furthermore, Turkey treated Crete as a foreign country by imposing on importations from the island the ordinary customs duties, which measure implied her tacit assent to the *status* of Crete as a separate state.

On July 23, 1906, the protecting Powers, through their consuls in the island, informed the Cretan Government that "as they wished to enlarge the autonomy of the island in a more national sense," they had asked King George of Greece to send to Crete officers of the Greek Army to be placed at the head of the local police and militia, promising to withdraw their troops from there, and added that

"every forward step" for the realization of the national aspirations of the Cretans was conditional upon the maintenance of order in the island.

After the resignation of Prince George, the protecting Powers took the forward step which they had promised, and on September 14, 1909, made the following significant declaration to the Cretan Government:

The protecting Powers in order to show their wish to take into account, as far as possible, the aspirations of the Cretan people and to recognize in a practical manner the interest that His Majesty the King of the Hellenes shall take always in the prosperity of the island, they agreed to propose to His Majesty that in future, each time the position of the High Commissioner would be vacant, His Majesty after consultation with the Representatives of the Protecting Powers at Athens, should nominate a candidate capable of executing the mandate of the Powers in the island and notify officially his choice to them.

This "forward step" left no doubt in the minds of the Cretans and of the Sultan that the incorporation of the island with Greece was very near and expected to be accomplished on the withdrawal of the international troops from Crete.

The appointment of Mr. Zaimis, an ex-Greek Premier, as High Commissioner, proved very successful, satisfying not only the Cretans, but also the Powers.

But in the meantime the question of the *status* of the island was left where it was before, Mr. Zaimis being also not a governor, but a High Commissioner, namely, a delegate of the Powers on whose behalf he administered the island.

In September, 1908, Turkey, for the second time, declared itself to be "a constitutional country." Theoretically the Constitutional regime was only revived, because Sultan Hamid had in 1877 simply prorogued the "Parliament" *sine die*.

In October, 1908, Emperor Francis Joseph by a stroke of the pen incorporated into the Dual Monarchy, Bosnia and Herzegovina, the two Turkish provinces which were under his administration, Bulgaria having preceded him by declaring her independence.

The Cretans, the very next day, namely, on October 17, 1908, proclaimed also their union with Greece, and appointed an Executive

Committee to administer the island in the name of King George, giving notification of that fact to the foreign consuls in Crete. Mr. Zaimis, being at that time fortunately absent from the island, escaped the dilemma with which he would have been confronted had he been in his post, of being faithful to the Powers or to his country. He now resumed his duties in the Greek Chamber, this being another anomaly, because he never resigned his Cretan post.

The protecting powers in answer to the Cretan communication, which does not seem to have disturbed them in the least, said that "they would consider favorably the discussion of the question with Turkey, if order was maintained in the island and the security of the Mussulmans was secured." On the other hand, in their joint note to the Porte, they reassured the Turkish Government that the *status quo* and the supreme rights of the Sultan would be maintained in the island. This dubious expression of "supreme rights" was subsequently explained by the Powers as meaning sovereign rights, although the Powers in their previous dispatches to the Porte referring to their resolution to make Crete a separate state under the suzerainty of the Sultan used the words supreme rights as equivalent to suzerain and not to sovereign rights.

On July 27 of the present year the international troops were withdrawn from the island, notwithstanding the efforts of the Porte to postpone their departure. The protecting Powers have, however, decided to station some gunboats in Suda Bay in order to protect the Turkish flag, floating on a barren islet in that bay, as the emblem of the supreme rights of Turkey on the island, and at the same time notified again the Cretan Government that they would maintain the *status quo* in Crete, meaning thereby that its political *status* shall not be changed.

On July 27, 1909, as soon as the international troops retired from the fortress of Chanea, the Executive Committee hoisted there the Greek flag.

This action gave rise to a serious incident. The protecting Powers considering that the Greek emblem on the fortress was a violation of the *status quo*, which they agreed to maintain in the island, demanded from the Cretan Government the lowering of the

flag. The answer of the Executive Committee to that peremptory demand was that since their declaration of union with Greece, namely, in October, 1908, the Greek flag was hoisted on all their public buildings, and what was more significant, that it was hoisted on the fortress of Rethymno, after the evacuation of that place by the Russian troops some months ago, and that the Committee did not see the difference between the two cases.

But the Powers in their rejoinder explained to the Cretans that when the Greek flag was hoisted at Rethymno and the other public buildings they had not sent their note in regards to the maintenance of the *status quo*, and that, therefore, whilst all the flags hoisted before their joint note could not be objected to, on the contrary that hoisted after the note on the Chanea or other fortress should be lowered.

On the refusal of the Cretans to acquiesce in the demand of the Powers, blue-jackets from the international fleet, landing at Chanea, proceeded to the fortress and at an early hour, before the flag was hoisted, cut the staff, thus giving a technical satisfaction to Turkey.

It is really difficult to understand why the hoisting of the Greek flag at Rethymono and the public places was not considered by the Powers as a violation of the *status quo*, since long ago they had assured the Porte that they would maintain in the island the supreme rights of the Sultan. Can it be said that their last note was more sacred than those of previous dates?

The recent political upheaval in Greece brought again into prominence the Cretan Question, on account of the declaration made by many Cretan leaders that the inhabitants of the island were firmly resolved to send deputies to Athens as soon as the "Boule" would reassemble after the next elections, which were to take place in the beginning of this year.

Sensitive "Young Turkey," considering such an act as an "encroachment upon her imprescriptible sovereign rights" — whatever those might be — threatened to thunder again from Mount Olympus (in Thessaly) her inveterate enemies the Hellenes.

Greece, on one hand, unprepared to receive such a shock, and, on the other, perceiving that Europe, for one reason or another, was not

yet willing to take the promised "forward step" in regards to Crete and would probably leave her, the Hellenic Kingdom, to its fate in case of an invasion of Thessaly by the Turks, was trying to devise means to ward off the incoming danger, when, the Military League in its perplexity resorted to a measure which the Athenians of nearly 2,500 years ago applied in their moments of despair.

In fact, it was over five centuries B. C. that the citizens of Athens, having incurred the "wrath of the Gods" for violating the sacred right of asylum by murdering in a temple some insurgent citizens, were visited by a terrible pestilence, and "oppressed with sorrow and despondency saw phantoms and heard supernatural menaces, and felt the curse of the Gods upon them without abatement."

It seems that the Athenians in their plight having consulted the Delphian oracle, were told to invite "a higher spiritual influence from abroad, and at their solicitation Epimenides, the famous Cretan sage, came to Athens from the island in order to save the city of Minerva from the consequences of the divine wrath. The celebrated Cretan, who was nicknamed Purifier and Medical Prophet, so the story goes, succeeded "to restore both health and mental tranquility at Athens," paving besides the work of his contemporary Solon the law giver, and departed, "carrying with him universal gratitude and admiration."

The modern Athenians, therefore, in imitation of their forefathers, turned also their eyes on the island of Minos for help and assistance, and thus brought to Athens the well-known Cretan patriot Mr. Venizelos, who seems, so far, to have achieved not less success by extricating, be it temporarily, Greece from a dilemma, by suggesting the convocation—in violation even of the constitution—of a National Assembly, thus putting off for another year the danger which would have resulted from the incoming elections of sending Cretan deputies to the Boule. There is no doubt that Greece will utilize the services of Mr. Venizelos until the end of the crisis, who will very probably, like his compatriot, Epimenides, win later on the "gratitude of the Athenians."

But the ever-watchful "Protecting Powers," not satisfied with this arrangement, gratified their rebellious wards, the Cretans, with

a peremptory note by which they told them that should they carry out their project in sending deputies to the Greek Boule or the National Assembly, the necessary steps would be taken by them to frustrate the Cretan plan.

To revert to our subject, it may now be asked what is, after all, the political or international status of Crete?

She is certainly not an independent state, nor can rightly be considered as part of the Hellenic Kingdom, although the country is administered in the name of King George and the laws of Greece apply *mutatis mutandis*, and although its public officers swore allegiance to the King of the Hellenes; nor can the acceptance by the Postal Union of letters from Crete with the emblem of "Hellas" on their postage stamps be considered as an acquiescence by the Powers of the union of Crete with Greece.

The island is, as it was well observed by Sir Edward Grey, in trust, in the hands of the four protecting Powers, which trust seems to be dormant for the moment, or at least exercised in a benevolent manner; for otherwise it cannot be explained how the "trustees" permitted their "ward" to act as if the island was not in the least connected with the Ottoman Empire.

As a matter of fact the protecting Powers have all along played a double game; on one hand they kept assuring the Porte that they would maintain her "supreme rights," on the other hand, they have been paving the way for the union of the island with Greece.

They have encouraged that hope not only in words, but also in acts. The appointment of a Prince of the Greek Royal house as High Commissioner, of Greek officers at the head of police and militia of the island, and the right given to the King of the Hellenes to nominate in future the High Commissioner could not have any other meaning but that they had firmly resolved to solve the Cretan question in accordance with Hellenic aspirations. In their early communications, both to Greece and to the Cretans, they declared that for *the present* the union was not possible; in their recent notes they said that the realization of that *desideratum* depended on the maintenance of order on the island; and in their very last note to the Executive Committee, after the declaration of union

with Greece, they promised to consider favorably that wish and to discuss the question with the Porte.

It is, therefore, evident that the only question to be discussed with the Sultan's Government — provided the Powers are consistent with their previous policy — is the incorporation of the island with Greece. It is to that policy that they are committed. Any one conversant with the diplomatic history concerning Cretan affairs can not form any other opinion.

Autonomy or any other similar regime ought to be out of the question, because that was already settled over twelve years ago when Crete became a separate state, which arrangement even the Porte had tacitly accepted.

As a matter of fact, there now exists in the island a self-government without any restriction or limitation, with the exception of the shadowy *rights* of the Sultan indicated in the emblem of a flag on a barren islet in the Cretan territorial waters; it is therefore not likely that the Cretans will accept any other solution but union with Greece.

But will European diplomacy cut that Gordian knot, or will they wait for a modern Theseus to kill the new Cretan Minotaur?

THEODORE P. ION.

HOW THE GREAT LAKES BECAME "HIGH SEAS," AND THEIR STATUS VIEWED FROM THE STAND- POINT OF INTERNATIONAL LAW

The convention which met in 1787 to frame the Constitution of the United States, embraced two earnest and determined bodies of men. One favored a strong central government; the other opposed any great increase of power over that granted by the Articles of Confederation. With what jealousy the states guarded their rights and with what reluctance they made surrenders to the federal government is common knowledge. The Constitution, as adopted, was a compromise between the factions, and that part relative to admiralty and maritime jurisdiction was the second great compromise between conflicting depositories of power.

The first occurred after a struggle waged for centuries between the admiralty and the common-law courts of England. After the Norman Conquest of England, the Norman admirals claimed exclusive jurisdiction over all maritime matters which arose not only on the open sea but on waters within the body of a county, and the right to try without a jury. A deputy of the admiral sat as the court, being often a nautical man and calling to his aid expert masters of ships. The common-law courts claimed jurisdiction of all matters upon land and water within the body of a county and the right to try with a jury. The conflicting claims at length became subject of compromise and 13 Richard II (ch. 5) declared that the admiralty must not meddle henceforth of anything done within the realm, but only of a thing done upon a sea.

The 15 Richard II (c. 3), coming two years later, removed all doubt as to what was meant by the "realm of the sea," in ordering that things done within the bodies of counties by land or water, the admirals should not have cognizance, but they shall be tried by the law of the land.¹

¹ 3 Blackstone 68, 69, 106; 4 Blackstone 268; 2 Bacon's Abridgment 735; Comyn's Digest.

Thus it became and was that admiralty embraced acts committed and things done upon the "high seas" and out of the reach of the common-law courts of justice. The admiralty never pretended to claim after 15 Richard II, nor could it rightfully exercise jurisdiction except in cases where the service was performed or to be performed on the sea: upon the waters within the ebb and flow of the tide. In brief, this is the way the law of England stood at the time of the adoption of the American Constitution.

The second great compromise occurred, as is stated above, in the Constitutional Convention. It came about when the question was being discussed as to what admiralty and maritime jurisdiction the states were to surrender to the central government.

England established courts of vice admiralty throughout the colonies in 1697 with power to try admiralty and revenue cases without a jury, after a very strenuous resistance had been made, especially by the chartered colonies.²

The Articles of Confederation, in defining the powers of Congress, allowed that

of establishing courts for the trial of piracies and felonies committed on the high seas, and establishing courts for receiving and determining appeals in all cases of captures.³

The duty of hearing appeals in prize cases from the state courts, performed for several years by a standing committee of Congress, had been finally transferred to an admiralty court of appeals, consisting of three judges.

This authority was not exercised without some sharp conflicts with state authorities.⁴

Such historical facts could be multiplied, but those mentioned are sufficient to illustrate the opposition of the states to inroads upon their admiralty.

The central government was for national purposes and the state governments for municipal purposes. The powers surrendered by the state were those which were either external to themselves, or

² Hildreth's History of U. S., vol. II, p. 198.

³ Art. IX, July 9, 1778.

⁴ Hildreth's History of U. S., vol. III., p. 404. 1780.

those which, when surrendered, would revert to the mutual advantage of *all* the states. All powers not clearly surrendered to the central government were left to the states and to the people.

It was in the broadest language that the states gave admiralty jurisdiction to the federal government. The whole judicial power of the federal government is to be found in subdivision 1, section 2, article 3 of the Constitution. Respecting the subject under discussion we quote,

The Judicial power shall extend to all cases in law and equity arising under this Constitution * * * to all cases of admiralty and maritime jurisdiction. * * *

It may therefore be asserted that in 1789, the limits and extent of admiralty and maritime jurisdiction were well established and admitted of no uncertainties. The states gave the federal government jurisdiction over the ocean, which included the high seas, the common highway of nations, waters which were open, free and common to all, and which were not in the jurisdiction or under the control of any foreign power or of any state of the union. It was a matter for national control, being entirely outside, rather than inside the union. This is illustrated by section 8 of the Crimes Act, of April 30, 1790, which limited the punishment of certain enumerated crimes by the United States to those committed

upon the high seas, or in any river, haven, basin or bay out of the jurisdiction of any particular state.

But I apprehend it may fairly be doubted whether the Constitution of the United States meant, by admiralty and maritime jurisdiction, anything more than that jurisdiction which was settled and in practice in this country under the English jurisprudence when the Constitution was made.⁵

For fifty-six years after the adoption of the Constitution, there appeared to be no tendency on the part of our eminent jurists nor inclination on the part of Congress to extend the admiralty jurisdiction of the United States.

Let us briefly review a few of the decisions of the United States Supreme Court, which may be considered as extracts from the na-

⁵ 1 Kent's Com. 377.

tion's log-book. By so doing, we will observe the evolution of admiralty and maritime jurisdiction and ascertain how and why the Great Lakes became high seas.

Mr. Justice Jay, in an early decision, clearly states the extent of admiralty and maritime jurisdiction in these words,

The judicial power of the Union was extended to cases of admiralty and maritime jurisdiction, because, as the seas are the joint property of nations, whose rights and privileges thereto are regulated by the law of nations, and treaties, such cases necessarily belong to national jurisdiction.⁶

When one *Bevans* was indicted for murder committed on an American ship of war lying at anchor in the main channel of Boston Harbor, in waters where the Massachusetts courts had theretofore exercised jurisdiction, Mr. Justice Marshall held that the United States courts had not jurisdiction of the offense charged.⁷

Two years later, the same learned Justice stated in no uncertain language what were not high seas.

The jurisdiction of the court depends on the place in which the fact was committed. * * * Is the place described a part of the high seas? If the words be taken according to the common understanding of mankind, if they be taken in their popular and received sense, the "high seas," if not in all instances confined to the ocean which washes a coast, can never extend to a river about half a mile wide, and in the interior of a country.⁸

The Crimes Act of March 3, 1825, which was drafted by Mr. Justice Story to correct the defects in the former acts,⁹ provided for the punishment of crimes by the United States when committed, upon the high seas, any arm of the sea, river, haven, creek, basin or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state. (Chapter 65).

Mr. Justice Story, in upholding the decisions of Chief Justice Marshall, speaking for a unanimous court, when a boat was libeled for wages earned upon the Ohio and Missouri Rivers, said,

⁶ *Chisholm v. Georgia*, 2 Dall. 419, 475. 1793.

⁷ *United States v. Bevans*, 3 Wheat. 336. 1818.

⁸ *United States v. Wiltberger*, 5 Wheat. 76, 94. 1820.

⁹ 2 Story's Life of Story, 402.

In respect to contracts for the hire of seamen, the admiralty never pretended to claim, nor could it rightfully exercise any jurisdiction except in cases where the service was substantially performed on the sea, or upon waters within the ebb and flow of the tide. This is the prescribed limits, which it was not at liberty to transcend.¹⁰

In affirming the *Thomas Jefferson* decision, in a case where a boat was engaged in trade between New Orleans and the interior towns on the Mississippi River and its tributaries, the southern terminus of the voyage being in tide water, Mr. Justice Story said,

The case is not one of a steamboat engaged in maritime trade or navigation. Though in her voyage she may have touched at one terminus of them, her employment has been, substantially on other waters. * * * The true test of jurisdiction in all cases of this sort is, whether the vessel be engaged, substantially, in maritime navigation, or in interior navigation and trade, not on tide waters.¹¹

The following year the same learned justice reaffirmed the position theretofore taken by the court and in the course of an opinion, speaking of admiralty jurisdiction, said,

Does it, in cases where it is dependent upon locality, reach beyond high water mark? Our opinion is that in cases purely dependent upon the locality of the act done, it is limited to the sea, and to tide waters, as far as the tide flows, and that it does not reach beyond high water mark. It is the doctrine which has been repeatedly asserted by this court.¹²

On February 26, 1845, Congress passed an act, which, among other things, provided,

That the District Courts of the United States shall have, possess and exercise the same jurisdiction in matters of contract and tort arising in, upon, and concerning steamboats and other vessels of 20 tons burden and upwards, enrolled and licensed for the coasting trade and at the time employed in business of commerce and navigation between ports and places in different states and territories, upon the lakes and navigable waters connecting said lakes as is now possessed and exercised by the said courts in cases of light steamboats and other vessels employed in navigation and commerce upon the high seas and all tide waters within the admiralty and maritime jurisdiction of the United States.

¹⁰ The *Thomas Jefferson*, 10 Wheat. 428, 429. 1825; *Peyroux v. Howard*, 7 Pet. 324. 1833.

¹¹ *Steamboat Orleans v. Phœbus*, 11 Pet. 175, 183. 1837.

¹² *United States v. Coombs*, 12 Pet. 72, 76. 1838.

The first radical encroachment upon the well recognized common-law jurisdiction of the states occurred in 1847, when the Supreme Court extended admiralty and maritime jurisdiction *intra corpus comitatus*, within the ebb and flow of the tide. The court refused to be governed by what were cases of admiralty jurisdiction in England at the time of the adoption of the Constitution, and expressed the opinion that the United States could not be deprived of admiralty jurisdiction merely because the states might have a similar jurisdiction over the same waters.

The facts upon which the court passed were peculiar. A libel had been filed in a district court to recover damages sustained by reason of a collision between vessels navigating the Mississippi River, about two hundred miles from the Gulf of Mexico. The court found that, at the point where the collision occurred, the waters of the river were slightly influenced by the pressure of the tide in the Gulf. The majority court, speaking through Mr. Justice Wayne, held that admiralty jurisdiction could be exercised over waters *influenced* by the ebb and flow of the tide, even though the waters were within the body of a county.¹³

The learned judge expressed himself as follows (p. 457):

There is an unanswerable constitutional objection to the limitation of "all cases of admiralty and maritime jurisdiction" as it is expressed in the Constitution to the cases of maritime jurisdiction in England when our Constitution was adopted. * * * To do so would make the latter a part and parcel of the Constitution, as much so as if those cases were written upon its face. It would take away from the courts of the United States the interpretation of what were cases of admiralty and maritime jurisdiction. It would be a denial to Congress of all legislation upon the subject.

While it can not be doubted that there exists in the federal government whatever power may be necessary to the full and unlimited exercise of "admiralty and maritime jurisdiction" and that Congress may pass all laws to give complete effect to that power, it seems doubtful whether the Constitutional Convention intended to give to Congress and the Supreme Court full power to either extend or limit the admiralty jurisdiction thus delegated.

¹³ *Waring v. Clarke*, 5 How. 441. 1847.

Justices Daniel, Grier, and Catron concurred with Mr. Justice Woodbury in an elaborate dissenting opinion covering thirty-six pages, in which the following points were made: That the Constitution of the United States is an instrument and plan of government founded in the common law and that to common-law terms and principles we must refer for a true understanding of it; that the principle was well settled that admiralty has no jurisdiction over acts unless committed upon the high seas, out of the limits of a county, and that for centuries no different rule has ever been followed; that the extending of admiralty jurisdiction results in the abolition of trial by jury; that if those who drafted the Constitution intended to include inland lakes and rivers within the admiralty and maritime jurisdiction of the United States they would have done so in express words, therefore the right was reserved to the states.

A new position was taken by the Supreme Court the following year. The court held that the power to regulate commerce conferred by the states upon the national government carried with it exclusive jurisdiction of admiralty. The dissenting opinions of Justices Catron, Daniel, and Woodbury constitute perhaps the finest history ever written of the growth and development of maritime jurisdiction in England up to the time of the adoption of the Constitution.¹⁴ A libel *in personam* had been filed by the bank to recover the equivalent of specie which was lost by reason of an alleged negligent fire which destroyed the company's boat on Long Island Sound. It was the first time the Supreme Court had been called upon to pass upon a contract of affreightment in an admiralty court. Mr. Justice Nelson, in the course of his opinion, said,

It is not to be denied that if the grant of power in the Constitution had reference to the jurisdiction of the admiralty in England at the time, and is to be governed by it, the present suit can not be maintained. Contracts growing out of the purely internal commerce of the state, as well as commerce beyond tide waters, are generally domestic in their origin and operation, and could scarcely have been intended to be drawn within cognizance of the Federal Courts.

The opinion delivered in this case was extremely unfortunate.

¹⁴ *New Jersey Steam Navigation Company v. Merchants Bank*, 6 How. 344. 1848.

It never was followed by the court, and its reasoning was directly overruled in 1868, as we shall see.

We are now ready to review a decision¹⁵ which has probably been cited and commented upon both favorably and unfavorably by the court itself more than any decision it ever rendered. A libel was filed to recover damages resulting from a collision on Lake Ontario in American waters, the boats being American vessels and engaged at the time in interstate commerce. In holding the Great Lakes and navigable rivers connecting same to be within admiralty jurisdiction, which meant a corresponding loss of rights to the bordering states, the court was not only compelled to complete the renunciation, expressed in previous decisions, of the admiralty law of England which had been brought to this country by our ancestors, to directly reverse the numerous decisions heretofore considered, rendered by Marshall and Story, but was compelled, in the opinion of members of the court itself, to change the meaning of words used in the Constitution. In holding that the law of 1845 was constitutional, Chief Justice Taney, speaking for the majority court, decided that at the time the American colonies adopted the English rule they were a series of states bordering upon the Atlantic seaboard, and, therefore, the English rule was applicable and was adopted; that every reason which existed for the grant of admiralty jurisdiction on the Atlantic applied with equal force to the Great Lakes, and that it was not the intention of the framers of the Constitution to confine the "blessings" of admiralty courts to that coast and deny its advantages where they were equally needed; that the admiralty and maritime jurisdiction of the United States should be made to depend upon the navigable character of the water and not upon the ebb and flow of the tide, and that there is nothing in the ebb and flow of the tide that makes waters particularly suited to admiralty jurisdiction nor anything in the absence of tide which renders them unfit; that the lakes are truly "inland seas," for the reason that different states border on one side and a foreign nation on the other; in short, that navigable waters are public, and being public, are within the legitimate scope of admiralty jurisdiction.

¹⁵ *Genesee Chief v. Fitzhugh*, 53 U. S. 443, 12 How. 1851.

Judge Manning of the Michigan Supreme Court, in commenting upon the Chief Justice's views, said,

The reasoning is not expository, but is based upon expediency alone. It is not to show what the Convention that formed the Constitution meant by admiralty and maritime jurisdiction, the only question involved in a constitutional inquiry, but to prove that the country has outgrown the Constitution.¹⁶

A dissenting opinion was handed down by Mr. Justice Daniel which included the following objections: that the construction to be placed upon any clause in the Constitution must be in the light of what is believed to have been the understanding of those by whom it was formed; that it was their evident intention to limit admiralty jurisdiction to the high seas where the tide ebbed and flowed; that the Constitution can not be construed by mere geographical considerations and can not stretch or contract; that admiralty power can not be exercised over waters within the body of a state without engrafting an amendment upon the Constitution. He said:

My opinions may be deemed unsuited to the day in which we live but they are founded upon * * * convictions as to the nature and objects of limited government * * * and I have * * * the consolation of the support of Marshall, Kent, and Story, in any error I may have committed. (p. 465).

The majority opinion was affirmed during the same term of court, Mr. Justice Daniel again dissenting.¹⁷

With the court swung about on another tack, progress in the direction taken became rapid.

In the *Magnolia* case, the Supreme Court carried the jurisdiction of admiralty to an extent incalculably beyond all other decisions.¹⁸ The libel was filed to recover damages resulting from a collision which occurred on the Alabama River wholly within the state of Alabama, above tide waters. Mr. Justice Grier held that when the states gave "admiralty and maritime jurisdiction" to the federal government, they surrendered all right to exercise that power over their own waters; that navigable waters had always been within

¹⁶ *People v. Tyler*, 7 Michigan 161, 282.

¹⁷ *Fritz v. Bull*, 12 How. 466.

¹⁸ *Jackson v. Magnolia*, 20 How. 296. 1857.

admiralty jurisdiction, but that Congress had not placed it by express enactment within any federal court. Three of the justices dissented. Mr. Justice Daniel, again dissenting, said:

He who, under convictions of duty, can not steadily oppose his exertions, though feeble and unaided, to the march of power, when believed to be wrongful, however overshadowing it may appear, must be an unsafe depositary of either public or private confidence. (p. 307).

It was but a hull before the oncoming storm when, the following year, the court refused to sanction the threatened extension of admiralty jurisdiction over contracts for the shipment of goods between ports within the same state on the Great Lakes.¹⁹ Justices Daniel, Grier, Catron, and Wayne held that admiralty jurisdiction, under the Constitution, was limited to the high seas.

After the civil war, while the North and South were yet palsied with unspeakable grief, admiralty jurisdiction was extended to wherever ships float and navigation successfully aids commerce, whether internal or external.²⁰

The court held that a state law conferring upon state courts jurisdiction of collisions between vessels upon its own waters is void. In the course of the opinion, which shows no new reasoning, Mr. Justice Miller said,

The history of the adjudications of this court, on this subject, is a very interesting one, and shows with what slowness and hesitation the courts arrived at the conviction of the full powers which the Constitution and the acts of Congress have vested in the Federal Judiciary. (p. 562).

No dissenting voice was heard in the chambers of the judges. Hon. Peter V. Daniel, of Virginia, one of the greatest exponents of the Constitution, had died in office May 31, 1860, after eighteen years on the supreme bench. The Hon. John Catron, of Tennessee, died May 30, 1865, and the Hon. John A. Campbell, of Alabama, resigned May 1, 1861.

The country seemed to accept the new order as the inevitable, and when *Allen v. Newberry* was overruled and admiralty took juris-

¹⁹ *Allen v. Newberry*, 21 How. 244. 1858.

²⁰ *Hine v. Trevor*, 4 Wall. 555, 563. 1866.

diction of maritime torts and contracts where the voyage was between ports in the same state, it was without a dissent, and with no public clamor.²¹ In that case a libel was filed to recover damages for a breach of contract of affreightment, being an Alabama case. Mr. Justice Clifford refused to consider the reasoning of Mr. Justice Nelson, in the New Jersey Navigation case, as being entitled to credit, and expounded a new view of navigable waters. He said:

Navigable rivers which empty into the sea, or into the bays or gulfs which form a part of the sea, are but arms of the sea, and are as much within the admiralty and maritime jurisdiction of the United States as the sea itself. Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it cannot be made to depend upon the power of Congress to regulate commerce. (p. 640).

Though Mr. Justice Miller, in *Hine v. Trevor*, held admiralty jurisdiction, as exercised on the Great Lakes and their connecting waters, to be governed by the act of 1845, Mr. Justice Nelson²² held the said act to be obsolete and of no effect and based all admiralty jurisdiction upon the Judiciary Act of 1789, which he found took cognizance of all civil causes of admiralty jurisdiction

upon the lakes and waters connecting them, the same as upon the high seas, bays and rivers navigable from the seas. (p. 20).

The court passed upon a libel filed to recover damages resulting from a collision between two American vessels in the Detroit River above Peche Island, in Canadian waters. Without giving its reasons for the view, the court held that the circumstance that a portion of the waters lay within the limits of another sovereignty constituted no objection to the exercise of admiralty jurisdiction.

It fell to the lot of Mr. Justice Field to apply to the navigable rivers flowing into the Great Lakes the same doctrine which Mr. Justice Clifford applied to rivers emptying into the sea. The court found that the Grand River, wholly within the State of Michigan, was a stream capable of bearing, for a distance of forty miles, a steamer of 123 tons burden and, by flowing into Lake Michigan, formed a continuous highway for commerce both with other states and with foreign countries. The learned judge held:

²¹ *The Belfast v. Boon*, 7 Wall. 624. 1868.

²² *Eagle v. Fraser*, 8 Wall. 15. 1869.

Those rivers must be regarded as public, navigable rivers in law which are navigable in fact and they constitute navigable waters of the United States within the meaning of the acts of Congress in contradistinction from navigable waters of the states when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water.²³

For the next twenty years but two decisions were handed down which affected admiralty jurisdiction. The court extended its jurisdiction over the Illinois and Lake Michigan Canal,²⁴ but refused to extend it in an action brought to recover damages from a fire alleged to have been set on land by a passing vessel.²⁵

In 1890, Congress extended the criminal jurisdiction of the United States to the Great Lakes.²⁶

Two years later, Mr. Justice Field laid the foundation for a radical departure from all previous decisions in holding for the majority court that land under the Great Lakes, though belonging to the riparian states, could not be used or disposed of to the injury or disadvantage of that interest which the public had in the same waters.²⁷ The learned judge said:

These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas. (p. 435).

Mr. Justice Field, the following year, held that the term "high seas" is

applicable to the open, unenclosed waters of the Great Lakes, between which the Detroit River is a connecting stream, and the courts of the United States have jurisdiction to try a person for assault with a dangerous weapon committed upon a vessel belonging to a citizen of the United States, where such vessel is in the Detroit River, out of the jurisdiction

²³ *The Daniel Ball*, 10 Wall. 557, 563. 1870; *Ex Parte Garnet*, 141 U. S. 1. 1890.

²⁴ *Ex Parte Boyer*, 109 U. S. 629. 1883.

²⁵ *Ex Parte Phenix Insurance Company*, 118 U. S. 630. 1886.

²⁶ Act of September 4th, 1890, R. S., sec. 5346.

²⁷ *Illinois Central Railroad Company v. People of the State of Illinois*, 146 U. S. 387. 1892.

of any particular state, and within the territorial limits of the Dominion of Canada.²⁸

In this case the court was called upon to interpret the Crimes Act, but its decision is largely made up of reasoning not dependent upon the language of the act itself.

The grounds for the new position taken by the court may best be expressed by quoting parts of the opinion.

If there were no seas other than the ocean, the term high seas would be limited to the open, unenclosed waters of the ocean. But as there are other seas besides the ocean, there must be high seas other than those of the ocean. (p. 254).

The Great Lakes possess every characteristic of seas. They are of large extent in length and breadth; they are navigable the whole distance by the largest vessels known to the commerce; objects are not to be distinguished from the opposite shores; they separate, in many instances, states, and in some instances constitute the boundary between independent nations; and their waters, after passing long distances, debouch into the ocean. The fact that their waters are fresh and not subject to the tides, does not effect their essential character as seas. (p. 256).

It is to be observed that the term "high" in one of its significations is used to denote that which is common, open, and public. Thus every road or way or navigable river which is used freely by the public, is a "high way." (p. 258).

The learned judge shows that the term "high seas" is used to denote open, unenclosed waters in contradistinction to its ports and havens and that there exist such open, unenclosed waters on the Great Lakes. He shows the great volume of commerce carried upon the Detroit River, but does not give a reason for declaring it to be a "high sea," other than those above stated.

Justices Gray and Brown dissented, stating, among other objections, that the lakes are not "high seas" for the reason that they are inland seas within the exclusive control of those countries within whose territories they lie and therein essentially differ from "high seas," where the law of no particular state has exclusive force, but all are equal; that the term "high seas" has never been regarded by any publicist or held by any court to be applicable to territorial

²⁸ *United States v. Rodgers*, 150 U. S. 249. 1893.

waters and like the word "highways" presupposes the right of the public to make free use of them and excludes the idea of private ownership; that the idea of giving to the courts of all nations jurisdiction over the high seas arises primarily from the fact that they belong to no particular sovereignty, but as to the Great Lakes, no nation has the right to navigate them except by the permission and subject to the laws of the United States and Great Britain, hence they are not, and never have been, "high seas." The dissenting opinions handed down by Justices Gray and Brown, in the *Rodgers* case, endeavor to show that the majority opinion is not in accord with a well-established line of authorities. After citing many American decisions, the learned jurists quote Kent, Sir William Scott, Vattel, Wheaton, Phillimore, Martens, Wharton, Lord Hale, Azuni, and Valin. Said Mr. Justice Brown:

But even if the lakes were to be considered as high seas, the term surely can not be applied to a river 22 miles in length, and less than a mile in width connecting the two lakes. (p. 284).

Again:

The opinion of the court in this case appears to inaugurate a wholly new departure in the direction of extending the jurisdiction of the Federal Courts. (p. 279).

When a libel was filed to recover for repairs made to a canal boat which was engaged at the time in navigating the Erie Canal, the court found that the canal, though lying wholly within the state of New York, formed a part of a continuous highway for interstate and foreign commerce, and only differed from other navigable waters by reason of the fact that it was rendered navigable by artificial means, and was within admiralty jurisdiction.²⁹ A vigorous dissent was entered by Mr. Justice Brewer, concurred in by Justices Fuller, Peckham, and Harlan, and stating, among other objections,

The grant to the National Government over admiralty and maritime matters was in the furtherance of commerce between this nation and others, and designed to secure uniformity in respect thereto, and does not extend to contracts made in respect to vessels which are incapacitated from foreign commerce, designed to be used exclusively for mere local traffic within a state. (pp. 54, 55).

²⁹ *Perry v. Haines*, 191 U. S. 17. 1903.

The above review has been made as complete as limited space would permit. It shows:

1. By what successive steps Congress and the Supreme Court enlarged the maritime jurisdiction of the United States.
2. The opposition which radical departures from former decisions met from members of the court.
3. That this branch of the law has been the subject of great uncertainty, and prolific conjecture.
4. That present-day rulings can not be considered as final.

A careful examination of every available text book upon international law shows that the Great Lakes were never considered in the light of seas, much less "high seas." But, since the Great Lakes *are* high seas, it may not be improper to ascertain whether or not there attaches to them any or all of the incidents of high seas within the meaning of international law. For two reasons such an inquiry is pertinent. *First*, the term "high seas" has no place in any discussion which does not deal with the subject of international law or admiralty and maritime matters; and *second*, international law may be properly taken up and considered when the rights and interests of two or more sovereign states are being considered in reference to any given state of facts.

OWNERSHIP

Under article 2 of the treaty of peace with Great Britain (Treaty of Paris, 1783), the Great Lakes, except Lake Michigan, were divided equally between the United States and Great Britain and the boundary line was run through their center. In 1814 (Treaty of Ghent, article 6), the division previously made was ratified, and at a later date (Webster-Ashburton Treaty, 1842), commissioners fixed the exact line. Under this apportionment, all of the waters are within the jurisdiction of Great Britain and the United States.

As the bordering states were admitted to the Union, Congress extended their boundaries to the international line, thus placing all the American division of the lakes within the jurisdiction of the bordering states. The states proceeded to exercise undisputed criminal and civil jurisdiction up to that line. That the United States government, in extending the jurisdiction of the states to the inter-

national line, surrendered its rights over those waters is further illustrated by the fact that, on numerous occasions, the State Department has addressed communications to the governors of the states of New York, Indiana, Illinois, Michigan, Ohio, Pennsylvania, and Wisconsin, urging them, in conformity with certain pledges made by the United States to Great Britain, to permit British subjects to use state waters.³⁰

While there are many instances where bodies of water designated as "seas" are within the exclusive jurisdiction and control of a certain or certain nations, it seems to be a well-settled principle of international law that the term "high seas" is applicable only to such waters as lie outside one marine league from the shore. Such waters are the property of no nation; all have equal rights thereon. Text writers upon international law make a mistake in stating that the high seas are the "common property of all nations." For the reason that they are incapable of being owned, they can not be held by nations even as tenants in common.

The open sea is not capable of being possessed as private property. The free use of the ocean for navigation and fishing is common to all mankind and the public jurists generally and explicitly deny that the main ocean can ever be appropriated. The subjects of all nations meet there, in time of peace on a footing of entire equality and independence.³¹

The High Seas are said in a certain sense to be *nullius territorium*.³²

The sea is made up of two parts, the "high" or "open" sea and the "marginal" or "jurisdictional" sea. There can be no "high sea" unless there is, surrounding it, a marginal sea. That England and the United States did not divide the ocean which lay between them, would seem to indicate that the ocean and the Great Lakes were considered in a different light at the time of the treaty

³⁰ Moore: International Law Dig., vol. 1, pp. 678, 679.

³¹ Kent's Commentaries, vol. 1, p. 29, 8th ed.

³² Sir Travers Twiss: Law of Nations, p. 290. 1884. See Moore: International Law Dig., vol. 1, p. 699; Herbert Walcott Brown: International Law, p. 8. 1896; Gallaudet: International Law, pp. 118, 121. 1886; Lawrence: Modern International Law, pp. 44, 46; Lawrence: Principles of International Law, p. 205. 1895; John Westlake: International Law, pp. 160, 175. 1904; Woolsey: International Law, secs. 54, 55, pp. 79, 81; L. Oppenheim: International Law, p. 306. 1905; W. E. Hall: International Law, 5th ed., pp. 59, 140.

of Paris. The bed of the Great Lakes is, up to the international line, the private property of Great Britain and the bordering Union states, and is part and parcel of their territory.³³ Their jurisdiction is as exclusive up to the line as over land within their recognized boundaries. The states bordering upon the sea also own that part of the sea bed which lies between their shores and the point where the "marginal" and "high seas" unite. It would appear that there is no "marginal sea" within the Great Lakes, for the reason that the waters are owned up to the arbitrary international boundary, regardless of distance.

There being no common or unappropriated waters on the Great Lakes and their connecting rivers and they containing no marginal sea, no part of their waters can be considered as "high seas."

NAVIGATION

By treaty, both the United States and Great Britain have equal right to navigate any part or portion of the Great Lakes.³⁴ No other nation has been a party to these or any other treaties respecting the right to navigate the Great Lakes.³⁵

Under the law of nations, waters which mark the dividing line between the possessions of two nations have long been deemed open to the free navigation of such powers, and within their admiralty jurisdiction.³⁶

By the Treaty of Washington (articles 27 and 28), the United States granted to Great Britain the right to navigate the St. Clair Flats Canal and Lake Michigan, subject to local restrictions, in return for the favor of the use, by it, for purposes of navigation, of the Welland Canal and the St. Lawrence River. That Great Britain should be compelled to secure the right to navigate American waters, and the United States be compelled to secure the right to navigate Canadian waters by treaty, would seem to indicate that the waters of

³³ *Lake Front Case*, 146 U. S. 387.

³⁴ Jay's Treaty, November 19th, 1794. Webster-Ashburton Treaty, August 9th, 1842. Treaty of Washington, May 8th, 1871.

³⁵ Henry Clay, Secretary of State, to Mr. Gallatin, Minister to England, June 19, 1826.

³⁶ *The Apollon*, 9 Wheat. 362, 369. 1824.

the Great Lakes are territorial, and that no other nation could navigate them unless a like treaty were entered into with the two first named powers.

The United States secured special consent from Great Britain to allow an agent of the United States Coast Survey to place signals in Canadian waters to aid in a survey.³⁷

If it be true that the Great Lakes are high seas, it logically follows that any European power may punish a crime committed upon the lakes in their own courts whenever it is able to lay hands on the offender. It would also follow that other nations than England and America would have the right to navigate these seas without any local restrictions, and even to send their fleets there and perhaps engage in hostilities upon its waters.³⁸

The learned judge might have added that all the rights which any nation has over merchantmen upon the high seas in time of war would exist and be exercisable upon the Great Lakes.

If the right to navigate certain waters is not free and open alike to all nations and all peoples, or is curtailed by restrictions not imposed by all maritime nations, they can not be "high seas."

WRECKING

Both Great Britain and the United States were denied the privilege of wrecking in waters not their own until the courtesy was accorded by reciprocal legislation.

The lack of a wrecking privilege in Canadian waters resulted in great injury to American shipping, and in 1878³⁹ Congress passed an act looking to a mutual arrangement. Owing to the failure of Canada to respond with like legislation, the matter was abated. It was again taken up in 1890 (May 24), by an act of Congress, and reciprocal action was taken in Canada, May 10, 1892. Proclamation was issued by President Cleveland July 17, 1893.

The matter seems now to be covered by treaty between Great Britain and the United States signed at Washington May 18, 1908.⁴⁰

³⁷ Moore: *International Law Dig.*, vol. 2, p. 364.

³⁸ Mr. Justice Brown, *U. S. v. Rodgers*, p. 283.

³⁹ June 17, "An act to aid vessels wrecked or disabled in the waters coterminous to the United States and the Dominion of Canada."

⁴⁰ See SUPPLEMENT to this JOURNAL, 2:303.

That nations other than the treaty parties should have rights of wrecking in the Great Lakes without undergoing the same course can truly be doubted.

Since, then, the open sea is not the territory of any state, no state has regularly a right to exercise its legislation, administration, jurisdiction or police over parts of the open sea.⁴¹

If the lakes are "high seas," the right of wrecking would, without question, exist in favor of every nation, without treaty stipulation.

FISHING RIGHTS

Within a year after the decision of *United States v. Rodgers*, our State Department was called upon to pass an opinion relative to the right of Americans to fish in Canadian waters outside one marine league from the Canadian shore. In holding that they did not possess such a right, Mr. Uhl said: ⁴²

Conceding then, that the Great Lakes, (including Lake Michigan which lies wholly within the boundaries of the United States) are "high seas" within the meaning of our federal crimes act, it by no means follows that those waters are "high seas" as regards territorial rights of the sovereignties which own their shores.

Again:

The right of fishing can not, by any parity or stretch of reasoning, be deemed a part of the stipulated rights of navigation and transit.

There is basis for the assertion that there is no marginal sea within the Great Lakes. After England and the United States divided the Great Lakes and their connecting streams, both Canada and the riparian states took jurisdiction over fisheries up to the international line.

It is admitted that the grant to Congress to regulate commerce on the navigable waters of the several states contains no cession of territory, and that the states may by law regulate the use of fisheries and oyster beds within the territorial limits, though upon navigable waters, provided

⁴¹ L. Oppenheim: International Law, vol. 1, p. 311.

⁴² Letter by Mr. Uhl, Acting Secretary of State to Messrs. Laughlin, Ewell and Haupt, May 23, 1894.

the free use of the waters for the purposes of navigation and commercial intercourse be not interrupted.⁴³

In direct conflict with the views of Kent appear to be those of Griggs. His view of the matter was that the

Regulation of fisheries in navigable waters within the territorial limits of the several states is, in the absence of treaty, a subject of state rather than federal jurisdiction; that the Government of the United States has power to enter into treaty stipulations on the subject with Great Britain for the regulation of fisheries in the waters of the United States and Canada along the international boundary; that the fact that a treaty provision would annul and supersede a particular state law on the subject would be no objection to the validity of the treaty.⁴⁴

The United States government entered into treaty relations with Great Britain upon this subject.⁴⁵

However, viewed from any point, it clearly appears that the rights of the United States and of Great Britain to the fisheries of the Great Lakes are as exclusive, to the international line, as their jurisdiction over their shores, which is in direct conflict with the rights enjoyed by all nations upon the high seas.⁴⁶

CRIMINAL JURISDICTION

Upon the high seas, every vessel, public or private, is, for jurisdictional purposes, an elongation of the territory of the nation of its owners, and of the flag which it bears. An offense committed on board such vessel is an offense against the sovereignty of that nation. Except for such a rule, crimes committed upon ship board would be without the jurisdiction of any nation and left to private parties to settle, or at the next port of entry.⁴⁷

⁴³ Kent's Commentaries, vol. 1, p. 485, 8th ed.

⁴⁴ Griggs, Atty. Gen., Sept. 20, 1898, 22 Op. 214; Moore: International Law Dig., vol. V., p. 161.

⁴⁵ Treaty signed at Washington, April 11, 1908, SUPPLEMENT to this JOURNAL, 2:322.

⁴⁶ Geo. B. Davis: Outlines of International Law, p. 42. 1887; Geo. B. Davis: Elements of International Law, p. 60. 1903; Sir Travers Twiss: Law of Nations, p. 300. 1884; L. Oppenheim: International Law, vol. 1, p. 333. 1905.

⁴⁷ Sir Sherston Baker: First Steps in International Law, p. 80. 1899; Maxey: International Law, p. 228. 1906. See also any work on international law.

In the absence of treaty

When a ship enters foreign waters, that is, within one marine league more or less from the shore, it becomes at once, with all on board, subject to the municipal laws of the country its visits, and this, for the reason that such waters are within the exclusive jurisdiction of a nation, and are territorial. The ship is no longer upon the high seas. It voluntarily subjects itself to the laws and regulations imposed by the foreign sovereign, and, in turn, is entitled to such protection as the sovereign usually extends to such vessels. The ship is as much within the territory of that country as though it were tossed by the waves upon its shores. It is upon the same footing as an alien, who, upon reaching the territory of another country, is bound to observe its laws and customs.

A private vessel, when it arrives in a foreign port ceases to be regarded as territory, unless treaty provides otherwise, and then becomes merely the property of aliens.⁴⁸

After using "open sea" and "high sea" as synonymous, L. Oppenheim says,

Private vessels are only considered as though they were floating portions of the flag state in so far as they remain whilst on the open sea in principle, under the exclusive jurisdiction of the flag state.⁴⁹

In America, criminal laws have been held to have no extraterritorial force and effect, and are to be strictly construed.⁵⁰ We are not considering either the status of certain privileged persons, consular courts and war vessels in a foreign jurisdiction, nor the immunity of citizens of western countries within eastern domains.

If any possible construction can be placed on criminal statutes which will prevent their operation within the territory of another sovereign state, such construction should govern. It is safe to presume that they were intended to operate only inside the nation enacting them.

⁴⁸ Woolsey: *International Law*, p. 81; *Schooner Exchange v. McFadden*, 7 Cranch 116, 144. 1812; *Gibbons v. Ogden*, 9 Wheat. 194. 1824; *Mason v. Int. Tr. Co.*, 197 Mass. 349; Taylor: *International Law*, p. 312, sec. 269. 1901.

⁴⁹ *International Law*, vol. 1, p. 318.

⁵⁰ Cases cited in U. S. Sup. Ct. Dig. L. Ed. New, vol. 5, pp. 5397-5401. See Editorial, this JOURNAL, 2:845, referring to the *Cutting Case*.

Crimes, in a legal sense, are local, and are so only because the acts constituting them are declared to be so by the laws of the country where they are perpetrated.⁵¹

We hold that the criminal jurisdiction of a nation is limited to its own dominions and to the vessels under its flag on the high seas, and that it cannot extend it to acts committed within the dominion of another without violating its sovereignty and independence.⁵²

In the United States the territorial principle is the basis of criminal jurisprudence and the place of the commission of an offense is generally recognized as the proper and only place for its punishment.⁵³

All crimes are, at common law, in a general phase, local. That is, no person can be convicted of them only in the country where committed.⁵⁴

American and English authorities agree that penal law is territorial.⁵⁵

While it does not seem contrary to the law of nations for a power to extend its jurisdiction as to certain matters over its own citizens residing or traveling in foreign territory, it is contrary to the policy of the United States to extend its jurisdiction to crimes there committed. The rule adopted by England is identical, excepting treason, bigamy, and premeditated murder. As to crimes the continental rule is different. It there operates to keep away from the home country, or bring to justice upon return, political offenders who can not be extradited.

The better opinion of jurists seems to oppose even the doctrine of concurrent criminal jurisdiction. The true test of jurisdiction is a concurrence of a criminal act, a breach of a local law, a present power to make an arrest, and a competent tribunal to try the offender. Crime is a derogatory force primarily blighting the locality where committed. Incidentally it entails far-reaching results. Analyzed, the act creates the violation rather than the person putting the act in operation.

In three notable instances the doctrine of strict territorial jurisdiction has met signal opposition.

⁵¹ Mr. Calhoun, Secretary of State, to Mr. Everett, Aug. 7, 1844.

⁵² Mr. Calhoun, Secretary of State, to Mr. Everett, Sept. 25, 1844. Moore: International Law Dig., vol. II., p. 225 *et seq.* Also pp. 855 to 859.

⁵³ Moore: International Law Dig., vol. II., p. 263.

⁵⁴ Bishop on Criminal Law, vol. 1, p. 467, sec. 552.

⁵⁵ Wilson and Tucker: International Law, p. 131. 1901.

I. Daniel Webster, when Secretary of State, advanced radical views as to what should be the rights of the United States merchant marine in foreign waters. He asserted that

the laws of a nation accompany her ships not only over the high seas but into ports and harbors.⁵⁶

The exact question under discussion was whether a vessel which was forced from its course by stress of weather or misfortune was subject to the local jurisdiction of the port of refuge. Webster would have looked in vain for precedent upon which to base his contention. His views amounted to no more than a theory of a state's sovereignty and supremacy. It was an innovation and was so considered by contemporary statesmen and writers.

II. The second instance referred to was the decision handed down in the case of *United States v. Rodgers*, which has heretofore been partially considered. In upholding the Webster contention, the court was compelled to make an exception to the rules of international law to give the United States court jurisdiction. Mr. Justice Field said:

It is true * * * that as a general principle, the criminal laws of a nation do not operate beyond its territorial limits. * * * We accept this doctrine as a general rule, but there are exceptions to it as fully recognized as the doctrine itself. One of those exceptions is that offenses committed upon vessels belonging to citizens of the United States within their admiralty jurisdiction, (that is, within navigable waters) though out of the territorial limits of the United States, may be judicially considered when the vessel and parties are brought within their territorial jurisdiction. (p. 264).

The vessel was not in port, but was merely passing through the territorial waters of the Dominion of Canada. In that case the court virtually held that the criminal statutes of the United States were in force on all waters where the United States had admiralty jurisdiction; that the Canadian division of the Great Lakes was within the admiralty jurisdiction of the United States; that the Great Lakes were high seas within the meaning of the federal crimes act. The reasons, however, given by the majority court for holding the Great

⁵⁶ Moore: International Law Dig., vol. II., p. 354.

Lakes to be "high seas" are broader, in terms, than a mere construction of the statute under consideration necessitated. The court held that from the very nature of the waters, and the surrounding natural conditions, they were high seas. As we have seen, the transition was gradual from lakes, public waters, inland seas, to high seas. The court altered their time-honored status and then applied the criminal statute.

As a result of the decision the whole jurisdiction of the Great Lakes underwent a change. Here are the results:

(a) Canada lost absolute jurisdiction over crimes committed on American vessels in her own waters. Thus, the principle laid down by J. Marshall in *Exchange v. McFadden*, that any restriction upon the absolute sovereignty of a nation over its land or water must come from that nation itself, is defied.

(b) The United States acknowledged jurisdiction over waters within which it has no right to make an arrest.

(c) The riparian states lost jurisdiction over crimes committed aboard vessels "on a voyage" within their own boundaries. When the Great Lakes and their connecting waters became "high seas," that moment the states lost jurisdiction.

(d) Criminal laws were given extraterritorial force.

(e) The term "high seas" lost its one true meaning as used in international law, became obscure and susceptible of several interpretations.

(f) The foundation was laid for the extension of federal jurisdiction over fisheries in the American division of the Great Lakes.

For many years, the only instance where the federal courts had jurisdiction of a crime committed in foreign waters was where an inhabitant of an American ship committed a crime against the person or property of another, and when the foreign government disclaimed, or declined to exercise jurisdiction.⁵⁷

The law seems well expressed by our Supreme Court:

Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and,

⁵⁷ Wheat.: International Law, 6th ed., p. 158.

if need be, the offenders punished by the proper authorities of the local jurisdiction.⁵⁸ •

The court stated that the true test is not alone the publicity of the act. If the act be of such gravity that it would awaken public interest *if known*, it is for the local authorities. Under that test, an offense of any gravity committed upon a foreign ship in territorial waters is subject to local jurisdiction, whether the vessel be stationed in the harbor or merely passing through such waters. It is hard to imagine an offense, which, if known in any port town, would not awaken public interest. The rule established in the *Wildenhus* case is certainly set at defiance when the United States claims jurisdiction of an offense which does not concern merely the internal workings of the ship committed upon an American vessel in Canadian waters.

There is no reason for any distinction between the immunities of a ship in the act of using its right of innocent passage, and of a ship at rest in the harbors of the state.⁵⁹

What difference could it possibly make whether Rodgers spent his years behind an American or an English lock? Why could not the United States have turned Rodgers over to the Canadian authorities for punishment, according to the practice in such cases made and provided? A nation may as well claim jurisdiction of offenses committed by its citizens on foreign vessels on the high seas as of those within the acknowledged and fixed territorial limits of a foreign nation.

III. The Institute of International Law, the following year (1894), passed an article which would seem to be in partial accord with the Webster doctrine.

Crimes and offenses committed on board foreign ships passing through the territorial sea, by persons on board of them, against persons or things on board the same ships, are as such, outside the littoral state, unless they involve a violation of the rights or interests of the littoral state or of its subjects not forming a part of the crew or passengers (article 6).⁶⁰

⁵⁸ *Wildenhus' Case*, 120 U. S. 1, 18. 1886.

⁵⁹ Hall: *International Law*, p. 201, 3rd ed. 1890; Taylor agrees with Hall. Taylor: *International Law*, p. 308, sec. 263. 1901.

⁶⁰ Moore: *International Law Dig.*, vol. I., p. 701.

It might be well in this connection to define "a violation of the rights and interests of the littoral state." The Institute committed itself, however, as to the status of foreign merchantmen in port.

Ships of all nationalities, by the fact of being in territorial waters, unless only passing through, are subject to the jurisdiction of the bordering state (article 8).

These declarations are entitled to great weight.

The principle that every nation has full and exclusive jurisdiction within its recognized limits is well established.⁶¹ Is it not hard enough to constitute a *custom* a *rule* of international law, and are there not great tangles of international problems upon which the hand of man has scarcely been laid? Why discuss, much less abrogate, a rule of international conduct unless its gross injustice is conclusively proven? Does not the old rule serve the needs of nations? As between the nationality of the ship, and the nationality of the place, the latter should govern. As long as nations jealously guard what may be called exclusive sovereignty jurisdiction, and are loath to surrender any absolute power which appears to effect a curtailment of their exclusive right to finally shape their own policies and to deal with their own matters, unless a corresponding privilege is accorded, no derogation of the principles of complete sovereignty can be imposed by one upon another without great danger. Though every individual has been compelled to surrender certain liberties for the good of the state, the nations have not surrendered sovereign rights for the good of all nations. But the time is rapidly approaching when, by uniform action, nations will gladly approve a limitation of the doctrine of absolute sovereignty, and in the interest of a uniform system of law and of the common good of nations, make surrender of certain powers.

POWER TO ALTER JURISDICTION OF WATERS

It would be unpardonable not to deal with one more phase of the matter. Can a nation rightfully (a) convert a high sea, or any por-

⁶¹ W. E. Hall: *International Law*, pp. 167, 170. 1880; Halleck: *Elements of International Law*, p. 95; Thos. E. Holland: *Studies of International Law*, p. 156. 1898; Thos. A. Walker, *Manual of International Law*, 1895.

tion thereof, into a territorial water, or (b) convert a territorial water into a high sea?

(a) Generally speaking, no. History shows that as many nations perfected their naval equipment, they endeavored to maintain exclusive jurisdiction over parts of the high sea.⁶² For nearly three hundred years publicists have unanimously held that such claims were contrary to the law of nations. It is also doubtful whether a nation has the right to arbitrarily extend its marginal sea beyond the marine league, the limit set by the law of nations. The long range of the modern gun may yet bring this question into prominence. We have seen that high seas are incapable of being owned and that rights of navigation, fishing, and commerce thereon, when once acquired, can not be subject to limitation. The law governing such waters is to be recognized, not imposed. If a nation, acting by itself, has no power to impose limitations upon waters where all nations have rights, it is doubtful whether nations jointly can accomplish the feat. Can many acting jointly, rightfully undertake to accomplish that, which, if done by one, would be void? The recognition of such a principle as applicable to international law, would surely be productive of great harm. It is also obvious that, if the marginal sea is extended, world peace will receive a great blow.

(b) Generally speaking, yes. In so doing, however, the nation is in the peculiar position of creating a thing which can not be owned. We see no objection to a nation dedicating territorial waters to the perpetual use of nations, present and future, provided no other nation has claims of interest or title, under treaty or otherwise, in such waters. If they have they also should join. Where such action is taken, the donors have no rights not common to every other nation. The right to make treaties and exclude other nations is irrevocably lost. The puzzle is, how the United States can convert the Great Lakes into "high seas" when only a part of them are within its jurisdiction. We are aware of no Canadian legislation or decision altering the Canadian division of the Great Lakes in conformity to the American view. Clearly the United States has no power in the premises.

⁶² See any work on international law.

CONCLUSION

Considering the changes which have been made during the last century influencing the law governing the Great Lakes, many conjectures as to what it will be may properly arise. It seems certain that it can not remain in its present unsettled condition. The bad feature of the whole matter is the uncertainty which has attached to questions of jurisdiction upon the Great Lakes and the consequent expense attendant upon taking cases through the courts with no assurance that former decisions of the same court will be considered or, much less, govern in a case at bar. Commercial interests demand that the law should be positive.

The gravest concern is that of the student of constitutional law. The Constitution of the United States should be interpreted according to the rules of construction applicable to statutes.⁶³ We should ascertain the understanding of those who, at the time, were chiefly instrumental in its creation. Who are in better position to know or explain the meaning of a given clause in an instrument than those who were present at the time, who listened to debates and arguments, and who were thoroughly conversant with the intricate problems which challenged the attention of the period's greatest minds?

Before the adoption of the Constitution, Alexander Hamilton, James Madison, and John Jay published a series of articles now known as the "Federalist," for the purpose of explaining the functions and powers of the new instrument. They showed that the admiralty and maritime jurisdiction of the United States, under the Constitution, was a power to be exercised outside, rather than inside, the Union.

The most bigoted idolizers of the state authority have not thus far shown a disposition to deny the National judiciary the cognizance of maritime causes. These so generally depend upon the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.⁶⁴

The Constitution of the United States has lasted, because it was based upon the usages and customs of England, as modified by the experience

⁶³ Cases cited New U. S. Dig. L. Ed., vol. 2, pp. 1573-1588.

⁶⁴ Alexander Hamilton, 10th Par. No. 80, "The Federalist." Thompson and Homans, Ed. 1831. Also No. 11.

of the Colonies, and the Constitution will last as long as it answers the needs of its framers, and no longer. To understand the Constitution, English customs and usages must be studied * * * and we must interpret the language of the Constitution in the light of its origin, as well as in the concrete case under investigation. It is the same with law.⁶⁵

To hold that the Constitutional Convention foresaw the extension of maritime jurisdiction to the Great Lakes is not to make its members good statesmen and poor prophets, but good prophets and poor statesmen. As all the powers enumerated in the Constitution were delegated by the states, the federal government became a *limited* government. The states could not delegate any admiralty or maritime jurisdiction which they did not at the time possess. That which they had was no more or less than that which England implanted.

In the light of the discussion herein, one can not help but wonder to what extent Congress, with the Supreme Court to uphold it, may extend its jurisdiction within state boundaries. While the states have adjusted themselves to changed conditions, and their loss of jurisdiction along certain lines is not being openly deplored, there will come a time when to stretch rather than to amend the Constitution, in matters which involve great losses of state jurisdiction, will mean national unpleasantness. The unmistakable tendency of the times is the increase of federal jurisdiction in all matters of commerce, but in the gaining of an invisible goal, safety dictates that the spirit of the Constitutional Convention should be ever present to the jurist.

HARRY E. HUNT.

⁶⁵ James Brown Scott, this JOURNAL, vol. 2, No. 1, p. 3, and see also vol. 2, No. 2, p. 444.

THE REAL STATUS OF THE PANAMA CANAL AS REGARDS NEUTRALIZATION ¹

I.

Preceding any intelligent discussion of the status of the Panama Canal regarding freedom of passage and inviolability in war, which have so generally and so loosely been spoken of as "neutralization" even in official documents of the latest date, it will be necessary first to examine the treaty obligations of the United States under which the Canal is now under construction, and which define the powers of control over it when it shall be finished.

The latest of these is the convention concluded November 18, 1903, by the late John Hay and Mr. Bunau-Varilla, Envoy Extraordinary and Minister Plenipotentiary of the Republic of Panama. This convention was proclaimed on February 26, 1904, after due ratifications, its title being "Convention for the Construction of a Ship Canal." ²

Article I guarantees the independence of Panama by the United States.

In Article II Panama

grants to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said Canal.

The width of the zone is ten miles, and it does not include the cities and harbors of Panama and Colon, but does include the small islands

¹ All but the fifth section of this paper was written about three and one-half years ago; that section was written about a year later. The whole is here printed substantially in its original form, and with no changes that affect the sense. In the *THE AMERICAN JOURNAL OF INTERNATIONAL LAW* for April, 1909, a distinguished retired officer of the Army published a paper on the same general subject in which conclusions are reached quite the contrary of those herein maintained. It seems worth while to present the opposite view-point to his in order that readers may have both before them, and form their own conclusions on a matter of wide interest to the nation, and particularly to the military services. — H. S. K.

² *Compilation of Treaties in Force*, 1904, p. 609.

in the former harbor called Perico, Naos, Culebra, and Flamenco. The article further grants

in perpetuity the use, occupation and control of any other lands and waters outside of the zone above described which may be necessary and convenient for the construction, maintenance, operation, sanitation and protection of the said Canal or of any auxiliary canals or other works necessary and convenient for the construction, maintenance, operation, sanitation and protection of the said enterprise.

In Article III

The Republic of Panama grants to the United States all the rights, power and authority

within the zone and auxiliary lands and waters mentioned in Article II,

which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.

It is interesting to note the peculiar wording of these two articles, in which Panama does not grant the territory, nor relinquish her sovereignty over it, but grants its "use, occupation and control" and relinquishes the "exercise * * * of sovereign rights, power or authority" therein.

In Article IV Panama

grants in perpetuity to the United States the right to use the rivers, streams, lakes and other bodies of water within its limits for navigation, the supply of water or water power or other purposes

as far as may be

necessary and convenient for the construction * * * and protection of the said Canal.

The words "its limits" above refer to the Republic of Panama and not to the Canal zone alone.

In Article V Panama

grants to the United States in perpetuity a monopoly for the construction, maintenance and operation of any system of communication by means of canal or railroad across its territory between the Caribbean Sea and the Pacific Ocean.

Article VII grants to the United States the exercise, under certain circumstances, of the right of eminent domain in the cities of Panama and Colon; and the right also to enforce sanitary measures and maintain public order therein in case of necessity.

Article IX provides that the entrance ports to the canal and the waters thereof, together with the towns of Panama and Colon "shall be free for all time."

Article XIV provides for the initial compensation and, after nine years, the annual payment to be made by the United States to Panama for the rights, powers, and privileges granted in this convention.

Article XVIII reads:

The Canal, when constructed, and the entrances thereto shall be neutral in perpetuity, and shall be opened upon the terms provided for by Section I of Article three of, and in conformity with all the stipulations of, the treaty entered into by the Governments of the United States and Great Britain on November 18, 1901.

Article XX provides that Panama shall abrogate, or procure the abrogation of, any privileges or concessions in favor of the government or citizens of a third power relative to an interoceanic means of communication that are incompatible with the terms of this convention, and which may have descended to or been assumed by the Republic of Panama.

Article XXIII reads:

If it should become necessary at any time to employ armed forces for the safety or protection of the Canal, or of the ships that make use of the same, or the railways and auxiliary works, the United States shall have the right, at all times and in its discretion, to use its police and its land and naval forces or to establish fortifications for these purposes.

Article XXV reads:

For the better performance of the engagements of this convention and to the end of the efficient protection of the Canal and the preservation of its neutrality, the Government of the Republic of Panama will sell or lease to the United States lands adequate and necessary for naval or coaling stations on the Pacific coast and on the western Caribbean coast of the Republic at certain points to be agreed upon with the President of the United States.

The remaining articles need not be quoted for present purposes.

A consideration of the articles quoted shows that our government has:

- (a) Monopoly of trans-Panama projects of communication.
- (b) The engagement of Panama to ensure us that monopoly by abrogation of any privileges or concessions to the governments or citizens of any third power.
- (c) Practical sovereignty over the Canal zone, excepting the cities and harbors of Colon and Panama, though no actual sovereignty is ceded in word and an annual rental is paid.
- (d) Rights and privileges directly and repeatedly expressed regarding the protection of the Canal, including the right to use troops and fortify, and the acquisition of naval as well as coaling stations.
- (e) To the maintenance of these objects, it guarantees the independence of Panama.

No plainer language is needed to indicate the determination of the United States to own, control, and provide for the defense of the Canal, alone and unaided, in so far as this instrument makes it possible.

But it will be noted further that the United States engages, in Article XVIII, that "the Canal, when constructed, and the entrances thereto shall be neutral in perpetuity;" and again, in Article XXV, where lands for naval or coaling stations are provided for, the words to the end of the efficient protection of the Canal and the preservation of its neutrality

are used. The declaration of Article XVIII and the words quoted from Article XXV are of serious import, and the meaning to be ascribed to them must be determined by a consideration of the circumstances leading up to the conclusion of the convention, and of the announced policy of our government, as well as of the exact meaning of the words "neutrality" and "neutral" in the connection used above.

Article XVIII, besides declaring the Canal to be neutral, prescribes that the Canal

shall be opened upon the terms provided for by Section I of Article three of, and in conformity with all the stipulations of, the treaty entered

into by the Governments of the United States and Great Britain on November 18, 1901.

This leads to an examination of that instrument, which is entitled a "Treaty to Facilitate the Construction of a Ship Canal,"³ and was proclaimed February 22, 1902, after due ratifications. It is better known as the Hay-Pauncefote Treaty.

In making this examination it should be borne in mind that the Hay-Pauncefote Treaty is the culmination of many years' dissatisfaction in the United States with the provisions of the treaty concluded in 1850 between the same nations which is generally known as the Clayton-Bulwer Treaty. The latter will be examined later, the present object being to discover exactly what conventions exist to-day under which the United States has obtained rights and assumed duties.

The Hay-Pauncefote Treaty recites in the preamble that the High Contracting Parties

being desirous to facilitate the construction of a ship canal to connect the Atlantic and Pacific Oceans, by whatever route may be considered expedient, and to that end to remove any objection which may arise out of the Convention of the 19th April, 1850, commonly called the Clayton-Bulwer Treaty, to the construction of such canal under the auspices of the Government of the United States without impairing the "general principle" of neutralization established in Article VIII of that convention, have for that purpose appointed as their Plenipotentiaries, etc.

Article I reads:

The High Contracting Parties agree that the present treaty shall supersede the afore-mentioned Convention of the 19th April, 1850.

Article II reads:

It is agreed that the canal may be constructed under the auspices of the Government of the United States, either directly at its own cost, or by gift or loan of money to individuals or Corporations, or through subscription to or purchase of stock or shares, and that, subject to the provisions of the present Treaty, the said Government shall have and enjoy all the rights incident to such construction; as well as the exclusive right of providing for the regulation and management of the canal.

Article III reads:

The United States adopts, as the basis of the neutralization of such ship canal, the following Rules, substantially as embodied in the Con-

³ Compilation of Treaties in Force, 1904, p. 380.

vention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:

1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

2. The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay in accordance with the Regulations in force, and with only such intermission as may result from the necessities of the service.

Prizes shall be in all respects subject to the same Rules as vessels of war of the belligerents.

4. No belligerent shall embark or disembark troops, munitions of war, or warlike materials in the canal, except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible dispatch.

5. The provisions of this Article shall apply to waters adjacent to the canal, within 3 marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time, except in case of distress, and in such case, shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

6. The plant, establishments, buildings, and all work necessary to the construction, maintenance, and operation of the canal shall be deemed to be part thereof, for the purposes of this Treaty, and in time of war, as in time of peace, shall enjoy complete immunity from attack or injury by belligerents, and from acts calculated to impair their usefulness as part of the canal.

Article IV reads:

It is agreed that no change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralization or the obligation of the High Contracting Parties under the present Treaty.

Article V, which is the last, has the usual phraseology concerning ratification.

Article II is an evidence of the determination of the United States that its government should own the Canal if it seemed best, and control it under any circumstances, alone and unaided.

Article III sets forth certain Rules as the basis of the "neutralization" of the canal,

substantially as embodied in the Convention of Constantinople,* signed the 28th October, 1888, for the free navigation of the Suez Canal.

There are significant omissions, however. In Article I of the Constantinople Convention⁵ it is declared:

The Suez Maritime Canal shall *always* be free and open, *in time of war as in time of peace*, to every vessel of commerce or of war, without distinction of flag. *Consequently the High Contracting Parties agree not in any way to interfere with the free use of the Canal, in time of war as in time of peace.*⁶

Again Article IV of the Constantinople Convention, in expressing the agreement of the powers to refrain from acts of hostility and belligerent operations, or acts having obstruction of the Canal in view, uses these words:

The Maritime Canal remaining open *in time of war* as a free passage, *even to the ships of war of belligerents * * * even though the Ottoman Empire should be one of the belligerent Powers.*⁷

The words in italics are not to be found in the Hay-Pauncefote Treaty, nor any words that can be construed to have a like meaning. This is the more significant when it is recalled that Lord Pauncefote was one of the negotiators of the Convention of Constantinople. It is true that the reading of Rule 6 of the Hay-Pauncefote Treaty at first sight appears to have a provision to a similar effect in the words "and in time of war, as in time of peace, shall enjoy," etc. But that makes no mention of, nor can its language be inferred to mean, any obligation to keep the Canal open to an enemy of the United States. By Rules III and IV belligerents are not forbidden to use the Canal; indeed the language of the Rules assures that they may

* Senate Document No. 151, 56th Congress, 1st Session.

⁵ See Part IV of this paper.

⁶ Italics the writer's.

⁷ Italics the writer's.

use it. The article opens with the words "The United States adopts * * * "; but nowhere is the United States specifically mentioned as a belligerent, or included in definite words in any such manner as is the Ottoman Empire in the articles of the Constantinople Convention. Nor is any special definite authorization laid down that an enemy of the United States may use the Canal to the detriment of the latter's interests. However far the Rules go in allowing the use of the Canal to belligerents in a war where the United States is a neutral, they certainly do not specifically include a belligerent who is an enemy of the United States. In this respect they are radically different from the Rules agreed to by the powers signatory to the Constantinople Convention, and the internal evidence of their wording is that they are adopted by the United States as the guide to its conduct in the treatment of belligerents in a war in which the United States itself is not engaged, and that only to that extent does the United States guarantee the "neutralization" of the Canal. Had the United States intended that the Canal should be free and open in war to its own enemies, it is certain that, with the provisions of the Constantinople Convention before the negotiators and avowedly used by them as a basis, the Rules would have been so specifically drawn as to obviate any doubt. As the text reads no such construction is admissible.

There is another significant omission in the Hay-Pauncefote Rules. The Constantinople Convention, in Articles IX and X, provides for certain measures for ensuring the execution of the treaty, for the maintenance of public order, and for the Imperial Ottoman Government ensuring

by its own forces the defence of its other possessions situated on the eastern coast of the Red Sea.

Article XI says:

The measures which shall be taken in the cases provided for by Articles IX and X of the present treaty shall not interfere with the free use of the canal. In the *same cases, the erection of permanent fortifications contrary to the provisions of Article VIII is prohibited.*^{*}

* Italics the writer's.

The provisions of Article VIII referred to are found in the words:

They (the Agents in Egypt of the Signatory Powers) shall especially demand the suppression of any work or the dispersion of any assemblage on either bank of the Canal, the object or effect of which might be to interfere with the liberty and the entire security of the navigation.

Article VII says, in part:

The powers shall not keep any vessel of war in the waters of the Canal. These prohibitions are not found in the Hay-Pauncefote Rules, and the British Government's view in this connection was expressed in a memorandum by Lord Lansdowne (August 3, 1901) communicated to Mr. Hay through Lord Pauncefote, in which is said:

I understand that by the omission of all reference to the matter of defence the United States Government desires to reserve the power of taking measures to protect the canal, at any rate when the United States may be at war, from destruction or damage at the hands of an enemy or enemies. * * * I am not prepared to deny that contingencies may arise when not only from a national point of view, but on behalf of the commercial interests of the whole world, it might be of supreme importance to the United States that they should be free to adopt measures for the defence of the canal at a moment when they were themselves engaged in hostilities.⁹

There are four other protocols or conventions that have a bearing upon transit across the Isthmus. On December 1, 1900, protocols were signed with the representatives of both Costa Rica and Nicaragua agreeing that negotiations shall be entered into

when the President of the United States is authorized by law to acquire control of such portion of the territory now belonging to Costa Rica (Nicaragua) * * * to construct and protect a canal * * * from a point near San Juan del Norte on the Caribbean Sea, via Lake Nicaragua to Brito on the Pacific Ocean.

It was further agreed that the course and terminals of the Canal should be the same as

were stated in a treaty signed by the Plenipotentiaries of the United States and Great Britain on February 5, 1900, and now pending in the Senate of the United States for confirmation.

⁹ Quoted in a paper by Professor Latané on the Neutralization Features of the Hay-Pauncefote Treaty in the Annual Report of the American Historical Association for 1902.

The Senate refused to confirm that treaty, and it was nearly a year later before the Hay-Pauncefote Treaty that is now in force was concluded.

In the Gadsden Treaty of 1853 with Mexico, certain provisions regarding interoceanic transit across the Isthmus of Tehauntepec by the plank and rail road were included that were of value to the United States, but which have no bearing on the Panama Canal.

There remains the Treaty of 1846 with New Granada, to which the Republic of Colombia has succeeded. It is entitled "Treaty of Peace, Amity, Navigation and Commerce,"¹⁰ and only its Article 35 has a bearing on the present subject. That article reads, in part:

The United States of America and the Republic of New Granada desiring to make as durable as possible, the relations which are to be established between the two parties by virtue of this treaty, have declared solemnly, and do hereby agree to the following points.

1st. For the better understanding of the preceding articles, it is, and has been stipulated, between the high contracting parties, that the citizens, vessels, and merchandise of the United States shall enjoy in the ports of New Granada, including those of the part of the Granadian territory generally denominated *Isthmus of Panamá*, from its southernmost extremity until the boundary of Costa Rica, all the exemptions, privileges and immunities, concerning commerce and navigation, which are now, or may hereafter be enjoyed by Granadian citizens, their vessels and merchandise; and that this equality of favors shall be made to extend to the passengers, correspondence and merchandise of the United States in their transit across the said territory, from one sea to the other. The Government of New Granada guarantees to the Government of the United States, that the right of way or transit across the *Isthmus of Panamá* upon any modes of communication that now exist, or that may be, hereafter, constructed, shall be open and free to the Government and citizens of the United States, and for the transportation of any articles of produce, manufactures or merchandise, of lawful commerce, belonging to the citizens of the United States; that no other tolls or charges shall be levied or collected upon the citizens of the United States, or their said merchandise thus passing over any road or canal that may be made by the Government of New Granada, or by the authority of the same, than is under like circumstances levied upon and collected from the Granadian citizens; that any lawful produce, manufactures or merchandise belonging to citizens of the United States, thus passing from one sea to the other, in either direction, for the purpose of exportation to any other foreign country, shall not be liable to any import duties

¹⁰ Compilation of Treaties in Force, 1904, p. 194.

whatever; or having paid such duties, they shall be entitled to drawback, upon their exportation; nor shall the citizens of the United States be liable to any duties, tolls, or charges of any kind to which native citizens are not subjected for thus passing the said Isthmus. And, in order to secure to themselves the tranquil and constant enjoyment of these advantages, and as an especial compensation for the said advantages and for the favors they have acquired by the 4th, 5th and 6th articles of this Treaty, the United States guarantee positively and efficaciously to New Granada, by the present stipulation, the perfect neutrality of the beforementioned Isthmus, with the view that the free transit from the one to the other sea, may not be interrupted or embarrassed in any future time while this Treaty exists; and in consequence, the United States also guarantee, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory.

The remaining five sections of the article have no special interest in connection with this examination. In his message of January 4, 1904, President Roosevelt argues at length to maintain that this article descended to Panama at the time of her separation from Colombia, and is still in force. In this connection, also, Crandall says, in *Treaties, their Making and Enforcement*, p. 238:

the provisions of Article XXXV of the treaty of 1846 * * * have been considered as forming a covenant "that runs with the land, to the duties and benefits of which the new state of Panama succeeded."

Admitting that the article stands, and has descended to Panama, and is not superseded by the Convention of November 18, 1903, a careful examination of its terms will show that:

(a) The general meaning of the article up to the neutrality clause has reference only to matters of commerce and peaceful communication.

(b) The possible exception is in the words

The Government of New Granada guarantees to the Government of the United States, that the right of way or transit across the Isthmus of Panama upon any modes of communication that now exist, or that may be, hereafter, constructed, shall be open and free to the *Government*¹¹ and citizens of the United States;

though the context here points again to commercial matters.

(c) Not even to the United States is specifically granted authority

¹¹ Italics the writer's.

for the transit of troops, though the use of troops is inferentially permitted by the guarantee clause.

(d) The transit of ships of war of the United States is not specifically granted, even in peace.

(e) Only inferentially by the use of the word "neutrality," and by the lack of any qualifying words to the expression "free transit," can the citizens or governments of foreign powers be considered to have any rights whatever under the article, and that construction is greatly, if not entirely vitiated by the opening words of the neutrality clause, which are "And, in order to secure to *themselves* * * *"

The entire article seems to have been drawn with the interests of the United States and New Granada only in view, and without reference to any third power's sharing in similar benefits. The use of the word "neutrality" is not exact under any circumstances, and seems here to mean that the United States did not propose to have transit interrupted. As is known, this has repeatedly been construed to devolve upon the United States the duty of maintaining open transit during periods of domestic disorder. Certain it is that the word "neutrality" in this treaty conveys no such meaning as is carried by the word "neutralization" in the Constantinople Convention. Finally, in whatever light the Treaty of 1846 be considered as bearing on present-day conditions, there is nothing in it relating to Isthmian transit that is not more broadly and comprehensively stated in the Hay-Bunau-Varilla Convention.

The construction, control, maintenance and protection of the Panama Canal are thus seen to constitute a question between the United States, on the one hand, and Great Britain and Panama, on the other, as far as any direct treaty stipulations with foreign governments go.

II.

It will now be profitable to compare the provisions of the Hay-Pauncefote Treaty with those of the Clayton-Bulwer Treaty, and trace the history of the latter through the term of its existence. A remarkable change of attitude in the United States toward Isthmian Canal matters will be observed, which will shed great light upon the meaning to be ascribed to the expressions regarding "neutrality"

and "neutralization" in our treaties with Great Britain and Panama.

The terms of the Clayton-Bulwer Treaty, whose title is "Convention Relative to a Ship Canal by Way of Nicaragua, Costa Rica, the Mosquito Coast, or any Part of Central America,"¹² are so different from those of the Hay-Pauncefote Treaty that the former treaty is quoted almost in its entirety.

The United States of America and Her Britannic Majesty, being desirous of consolidating the relations of amity which so happily subsist between them by setting forth and fixing in a convention their views and intentions with reference to any means of communication by ship-canal, which may be constructed between the Atlantic and Pacific Oceans by the way of the river San Juan de Nicaragua and either or both of the lakes of Nicaragua or Managua, to any port or place on the Pacific Ocean, [recites appointment of plenipotentiaries, who] have agreed to the following articles.

ARTICLE I.

The Governments of the United States and Great Britain hereby declare that neither the one nor the other will ever obtain or maintain for itself any exclusive control over the said ship-canal; agreeing that neither will ever erect or maintain any fortifications commanding the same, or in the vicinity thereof, or occupy, or fortify, or colonize, or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America; nor will either make use of any protection which either affords or may afford, or any alliance which either has or may have to or with any State or People for the purpose of erecting or maintaining any such fortifications, or of occupying, fortifying, or colonizing Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America, or of assuming or exercising dominion over the same; nor will the United States or Great Britain take advantage of any intimacy, or use any alliance, connection or influence that either may possess, with any State or Government through whose territory the said canal may pass, for the purpose of acquiring or holding directly or indirectly, for the citizens or subjects of the one, any rights or advantages in regard to commerce or navigation through the said canal which shall not be offered on the same terms to the citizens or subjects of the other.

ARTICLE II.

Vessels of the United States or Great Britain traversing the said canal shall, in case of war between the contracting parties, be exempted from

¹² Treaties and Conventions, 1776-1887, p. 440.

blockade, detention, or capture, by either of the belligerents; and this provision shall extend to such a distance from the two ends of the said canal as may hereafter be found expedient to establish.

ARTICLE III.

In order to secure the construction of the said canal, the contracting parties engage that, if any such canal shall be undertaken upon fair and equitable terms by any parties having the authority of the local government or governments through whose territory the same may pass, then the persons employed in making the said canal and their property used, or to be used, for that object, shall be protected, from the commencement of the said canal to its completion, by the Governments of the United States and Great Britain, from unjust detention, confiscation, seizure, or any violence whatsoever.

ARTICLE V.

The contracting parties further engage that when the said canal shall have been completed they will protect it from interruption, seizure, or unjust confiscation, and that they will guarantee the neutrality thereof, so that the said canal may forever be open and free, and the capital invested therein secure. Nevertheless, the Governments of the United States and Great Britain, in according their protection to the construction of the said canal, and guaranteeing its neutrality and security when completed, always understand that this protection and guarantee are granted conditionally, and may be withdrawn by both Governments, or either Government, if both Governments or either Government should deem that the persons or company, undertaking or managing the same adopt or establish such regulations concerning the traffic thereupon as are contrary to the spirit and intention of this convention, either by making unfair discriminations in favor of the commerce of one of the contracting parties over the commerce of the other, or by imposing oppressive exactions or unreasonable tolls upon passengers, vessels, goods, wares, merchandise, or other articles. Neither party, however, shall withdraw the aforesaid protection and guarantee without first giving six months notice to the other.

ARTICLE VI.

The contracting parties in this convention engage to invite every State with which both or either have friendly intercourse to enter into stipulations with them similar to those which they have entered into with each other; to the end that all other States may share in the honor and advantage of having contributed to a work of such general interest and importance as the canal herein contemplated. And the contracting parties likewise agree that each shall enter into treaty stipulations with such of the Central American States as they may deem advisable for the purpose of more effectually carrying out the great design of this convention, namely, that of constructing and maintaining the said canal as a ship

communication between the two oceans, for the benefit of mankind, on equal terms to all, and of protecting the same; and they also agree that the good offices of either shall be employed, when requested by the other, in aiding and assisting the negotiation of such treaty stipulations; and should any difference arise as to right or property over the territory through which the said canal shall pass, between the States or Governments of Central America, and such differences should in any way impede or obstruct the execution of the said canal, the said Governments of the United States and Great Britain will use their good offices to settle such differences in the manner best suited to promote the interests of the said canal, and to strengthen the bonds of friendship and alliance which exist between the contracting parties.

ARTICLE VIII.

The Governments of the United States and Great Britain having not only desired, in entering into this convention, to accomplish a particular object, but also to establish a general principle, they hereby agree to extend their protection, by treaty stipulations, to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America, and, especially to the interoceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama. In granting, however, their joint protection to any such canals or railways, as are by this Article specified, it is always understood by the United States and Great Britain that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the aforesaid Governments shall approve of as just and equitable; and, that the same canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other State which is willing to grant thereto such protection as the United States and Great Britain engage to afford.

It will be convenient to arrange the terms in parallel columns and then note how they compare in the two treaties.

CLAYTON-BULWER TREATY	HAY-PAUNCEFOTE TREATY
1850	(as ratified) 1902

Neither the United States nor Great Britain will ever obtain or maintain for itself any exclusive control over the said Ship Canal. (Art. I.)

The canal may be constructed under the auspices of the government of the United States, which, under the terms of this treaty, shall enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

Neither will ever erect or maintain any fortifications commanding the canal or in the vicinity thereof. (Art. I.)

This treaty is silent as to fortifications. The first draft, concluded Feb. 5, 1900,¹³ has as Rule 7, Article II, a clause prohibiting fortifications commanding the canal or the waters adjacent.

Neither party will ever occupy, fortify, colonize, assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America; nor to that end will either make use of any alliance, or protection afforded. (Art. I.)

This treaty is silent.

"Vessels of the United States or Great Britain, traversing the said Canal shall, in case of war *between the contracting parties*,¹⁴ be exempted from blockade, detention or capture, by either of the belligerents; and this provision shall extend to such a distance from the two ends of the said canal as may hereafter be found expedient to establish." (Art. IV.)

This treaty is silent, except for the general "neutralization" Rules.

The two powers engage that the finished canal shall be protected by them "from interruption, seizure, or unjust confiscation, and that they will guarantee the neutrality thereof, so that the said canal may forever be open and free." (Art. V.)

The dual guarantee of the Clayton-Bulwer Treaty becomes here a sole guarantee by the United States, Article III, reading: "The *United States*¹⁴ adopts, as the basis of the neutralization of such ship canal, the following Rules," etc. The earlier draft of Feb. 5, 1900, reads: "The High Contracting Parties * * * adopt," etc.

They "engage to invite every state with which both or either have friendly intercourse to enter into stipulations with them similar

This treaty has no reference to the association of foreign powers with the United States in any guaranty of neutralization. The

¹³ Foreign Relations, 1901, p. 243.

¹⁴ Italics the writer's.

to those which they have entered into with each other." (Art. VI.)

draft of Feb. 5, 1900, had as Article III, the following: "The High Contracting Parties will, immediately upon the exchange of the ratifications of this Convention, bring it to the notice of the other Powers and invite them to adhere to it." The Senate struck this out, and otherwise amended the treaty, which in its amended form, was not acceptable to Great Britain. The final treaty, however, is even less restrictive upon the United States than would have been this draft, as amended.

In order to establish a general principle, they agree to extend their protection, not alone to a canal at Nicaragua, but also "to any other practicable communications, whether by canal or railway, across the Isthmus * * * , and, especially to the interoceanic communications, — should the same prove to be practicable, whether by canal or railway, — which are now proposed to be established by the way of Tehuantepec, or Panama." (Art. VIII.)

The preamble adheres to the "general principle," the remainder of the Clayton-Bulwer Treaty being superseded by Article I.

The Clayton-Bulwer Treaty was an attempt to settle controverted matters that had become acute. The need for a canal was recognized in both countries, and each was jealous of the other's getting any exclusive control over it. The United States had asserted the Monroe Doctrine in 1823, and had recently, 1846, concluded the treaty with New Granada. But the probable location of the Canal at that time was in Nicaragua, and there the British had assumed a protectorate over the Mosquito tribe of Indians; and in June, 1848, they supported the Chief in a claim to the coast extending from the mouth of the San Juan River northward for some 500 miles. This included Greytown, the eastern terminus of the Nicaragua Canal, and gave Great Britain virtual control over the Canal route. The

attitude in the United States when the treaty was concluded in 1850 was one of extreme irritation, and Mr. Clayton, then Secretary of State, doubtless accepted less definite and favorable terms than he might have insisted on had he not feared the outbreak of war. While the treaty averted war, it was unfortunately vague in certain particulars concerning Great Britain's position in Central America, and was unsatisfactory to the United States from the first. The early sources of dissatisfaction, however, were in relation to Great Britain's tenure in Central America, and not with the features relating to the joint engagement of the two countries regarding the projected Canal itself. For ten years the two countries played at cross-purposes until, in 1860, after Great Britain had concluded new treaties with Honduras and Nicaragua, relinquishing the Mosquito Protectorate, President Buchanan in his message (Dec. 3) said:

The discordant construction of the Clayton-Bulwer Treaty between the two governments, which, at different periods of discussion, bore a threatening aspect, has resulted in a final settlement entirely satisfactory to this government.

Here is no hint of any desire for exclusive control by the United States, but entire satisfaction with a final settlement of the construction of the treaty in which that point had not been raised; the United States was satisfied that Great Britain had placed herself outside of any claim to exclusive control. Henderson, p. 137, *American Diplomatic Questions*, says:

Fundamentally, the motives of these disagreements may be traced largely to suspicion. While neither party actually sought a monopoly of political control over the canal route, each power distrusted the other, and was ready to detect in every move of its opponent a covert attempt to secure those forbidden advantages.

As a matter of fact the treaty was a legitimate outcome of the policy of the United States Government up to that time as expressed by both executive and legislative branches. In 1826, three years after the enunciation of the Monroe Doctrine, Henry Clay, in his instructions to the delegates to the Panama Congress, said:

If a canal across the Isthmus be opened so as to admit of sea-vessels from ocean to ocean, the benefits of it ought not to be exclusively appropriated to any one Nation; but should be extended to all parts of the globe upon the payment of a just compensation or reasonable tolls.

On March 3, 1835, the Senate passed unanimously a resolution requesting President Jackson to consider the expediency of opening negotiations with other governments concerning Canal matters, in which occurs the expression:

securing forever, by such stipulations, the free and equal right of navigating such canal to all such nations.

In 1839 the House, also unanimously, passed a resolution containing practically the identical expression quoted above. In 1846 came the treaty with New Granada already quoted; and, speaking of the Senate resolution quoted above in connection with that treaty, President Polk said:

There does not appear to be any other effectual means of securing to all nations the advantages of this important passage but the guarantee of great commercial powers that the Isthmus shall be neutral territory. The interests of the world at stake are so important that the security of this passage between the two oceans cannot be suffered to depend upon the wars and revolutions which may arise among different nations.

On November 8, 1849, the American Minister, Mr. Lawrence, inquired of Lord Palmerston, among other things,

whether the British Government will unite with the United States in guaranteeing the neutrality of a ship-canal, railway or other communication to be open to the world and common to all nations.

In his message to Congress, December 4, 1849, President Taylor said:

should such a work be constructed, under the common protection of all nations, for equal benefits to all, it would be neither just nor expedient that any great maritime state should command the communications.
* * * No such power should occupy a position that would enable it hereafter to exercise so controlling an influence over the commerce of the world, or to obstruct a highway which ought to be dedicated to the common use of mankind.

Then came the Clayton-Bulwer Treaty.

Throughout the years up to the Civil War, no desire for sole control was manifested in the United States. The underlying motive was the wish to have the Canal commercially free and open — an Open Canal Door, so to speak. As far as any military use of the Canal was concerned, that point of view did not greatly appeal to our people as yet, and inasmuch as they had equal rights under the

treaty with Great Britain and all foreign nations they were content. Indeed, with dual control, or multiple control, the only solution practicable was the unrestricted right of all to use the Canal in a military way, *i. e.*, for the passage of war vessels whether intent on war or peace.

After the Civil War a change in sentiment toward Canal matters began to manifest itself. Quoting Henderson, p. 138:

The United States emerged from its four years' conflict with enlarged ideas of her position in the world; the seeds of a new and more aggressive foreign policy had been sown. The progress of those ideas is marked by the Alaskan purchase, the attempts to secure naval bases in the West Indies, the expulsion of the French from Mexico, and by the evidences of a belief, then gradually forming in the minds of the people, that the United States should exercise sole political control over any Central American canal that should ever be built.

The rapid growth of the Pacific Coast, and the solidarity of the country resulting from the completion of the trans-continental railways, also doubtless directed attention to the Canal and to the undesirability of having it under any degree of control by foreign powers. In 1880 President Hayes, in a special message (March 8) used the words so often quoted since:

The policy of this country is a canal under American control. The United States cannot consent to the surrender of this control to any European power, or to any combination of European powers. * * * An inter-oceanic canal across the American Isthmus will essentially change the geographical relations between the Atlantic and Pacific coasts of the United States, and between the United States and the rest of the world. It will be the great ocean thoroughfare between our Atlantic and Pacific shores, and *virtually a part of the coast line*¹⁵ of the United States. Our merely commercial interest in it is greater than that of all other countries, while its relations to our power and prosperity as a nation, to our means of defense, our unity, peace, and safety, are matters of paramount concern to the people of the United States. No other great power would, under similar circumstances, fail to assert a rightful control over a work so closely and vitally affecting its interest and welfare.¹⁶

But the new note was struck several years before 1880. Secretary Seward, who in 1862 thought the interest of the United States in the Panama route no "different from that of other maritime

¹⁵ Italics the writer's

¹⁶ Snow's Topics in American Diplomacy, p. 340.

powers," and instructed our Ministers to Paris and London to inquire whether France and England would

unite with the United States in guaranteeing the safety of the transit route and the authority of the New Granadian confederation,¹⁷

said, shortly after the expulsion of the French from Mexico:

The United States would not permit a public enemy of the American continent the use or advantages of a work executed by nations of the New World.¹⁸

Although the Dickinson-Ayon Treaty with Nicaragua, concluded in 1867 (denounced by Nicaragua in 1902), had a clause in Art. XV embodying the agreement of the United States to use its influence

to induce them (other nations) to guarantee such neutrality and protection to all such routes of communication,

yet in 1868, in negotiating a new treaty with Colombia, Secretary Seward

inserted a clause that enemies of the United States should be excluded from the use of the proposed canal in time of war.¹⁹

Colombia rejected this clause, being in favor of international control, and the United States Senate failed to recommend the ratification of the treaty. Rodrigues, in *The Panama Canal*, pp. 186-7, says that a new treaty was concluded by Minister Hurlbut in January, 1870, in which the United States guaranteed to Colombia that the Canal and its dependencies should be exempt from all hostile acts by other nations, and that both agreed to obtain from other nations a guarantee of like import. But:

Both parties reserved the right of passing their ships of war at all times, but the canal will be closed against the flag of all nations which may be at war with either of the contracting parties.

And he quotes Secretary Fish as follows, in reply to a memorandum from Mr. Hurlbut setting forth the Colombian desire to have a joint protectorate, all nations having equal control:

¹⁷ Henderson, p. 138.

¹⁸ Snow's Topics, p. 338.

¹⁹ Henderson, p. 139.

In the present state of international law such joint protectorate would be a source of future trouble, * * * and might probably prove an obstacle to the ratification by the United States Senate of a treaty on the subject.

From the foregoing it appears that the Civil War marked the turn in the tide of opinion in this country from dual, or multiple, control and guarantee of neutrality to single control. After President Hayes' outspoken declaration in 1880 the latter sentiment grew, and it finally showed out as a definite policy of conviction after the Spanish War left the United States with added responsibilities and a broader view of its position in the family of nations. But the Clayton-Bulwer Treaty stood squarely across the path of this policy, and until it was removed the policy could not be made effective. Of the efforts during the years from 1880 to 1901, to have the treaty modified, and of the less worthy efforts to show that it might be considered as voidable, it is unnecessary for the present purpose to speak; the change of sentiment has been dwelt upon because of its bearing on the Hay-Pauncefote Treaty as finally concluded.

But this change of sentiment, great as it was, was not complete because it only here and there showed signs that the military necessities of the United States were well understood. As an evidence of this it is only necessary to recall the original Hay-Pauncefote Treaty, concluded February 5, 1900, but not ratified, with its dual adoption of the Constantinople Rules, its agreement to invite foreign nations to adhere to it, and its prohibition of fortifications. Although objectionable features of the Clayton-Bulwer Treaty were removed so that the United States could own, construct and manage the Canal, the original Hay-Pauncefote draft failed to supersede that objectionable instrument explicitly, and included the three matters above noted. Even the Senate, though it struck out the article inviting the adherence of foreign powers and inserted a clause superseding the Clayton-Bulwer Treaty, and also one

for securing by its own forces the defense of the United States and the maintenance of public order,

yet recommended the ratification of the treaty with the prohibition of fortification included. Thus slowly did the idea of the *military*

value of the Canal to the United States gain ground. That it at last did assert itself the treaty ratified in 1902 bears witness, with its remarkable and most significant omissions, which can only be understood in the light of a knowledge of what those omissions are and why they were made.

Summing up, "control" of the Canal now means to us the sole right to own, construct, maintain, operate and protect the Canal, and in doing the last we are not forbidden to fortify, nor to use our land and naval forces. Can this possibly mean that we must let our enemies in war have free use of the Canal *militarily* because we have entered into arrangements with two nations for the free use by mankind of the Canal under certain Rules for "neutralization?" The idea is unthinkable, certainly to the minds of men trained in military matters.²⁰ In case of war with England, the treaty would go by the board; in case of war with any other maritime power, no direct treaty obligations exist. The only possible objection to our forbidding the Canal to the military use of possible enemies is that, by a solemn declaration to two powers, but to two powers only, we have "adopted" certain Rules as a basis for the "neutralization" of the Canal. If we are not at war ourselves, we are, by the moral obligation of those two treaties, bound to make the Canal actually neutral water to other belligerents. But why, if we are not to enjoy the military advantages that control and the right to fortify give, when at war ourselves, should we have insisted upon being the sole guarantor, and, in effect at least, have insisted upon the right to fortify?

III.

Neutrality, as applied to a state, may be described as an attitude of its government, *voluntarily assumed by itself alone*, of abstention from acts in favor of either belligerent in a war to which the state practicing neutrality is not a party. Inherent to the idea of neutrality is a state of war that calls it forth; moreover, since neutrality

²⁰ This statement appears to have been too broad; one American military writer, at least, has advocated this view in print since the statement was originally written. — H. S. K.

is only founded on voluntary action, it is terminable at the will of the nation practicing it.

Neutralization, on the other hand, is an attitude *imposed by conventional arrangement* upon a government, usually, but not necessarily, with its consent, by virtue of which it always remains neutral in a war between other states, its territory is exempted from warlike acts of belligerents, and its own immunity from attack is guaranteed. Such a guarantee, to be effective, can only be given by a concert of powers.

By a natural extension of language the term neutralization is applied to persons and things, and has thus come into use in connection with the Suez and Panama Canals. Undoubtedly there is a proper use of the term in this connection; but it is also true that the word has been used in a loose and inexact way, not only in informal speech and print, but as well in formal documents, and even in treaties. Latané²¹ considers Holland the first writer of recognized merit to give a definition of the term "neutralization." Holland says:²²

So far "neutrality" is always the correlative of "belligerency." A State is neutral which chooses to take no part in a war, and persons and property are neutral which belong to a State occupying this position. The term has in recent times received a larger application. A condition of neutrality, or one resembling it, has been created, as it were, artificially, and the process has been called "neutralization."

States have been permanently neutralized by convention. Not only is it preordained that such States are to abstain from taking part in a war into which their neighbors may enter, but it is also prearranged that such States are not to become principals in a war. By way of compensation for this restriction on their freedom of action, their immunity from attack is guaranteed by their neighbors, for whose collective interests such an arrangement is perceived to be on the whole expedient.

"To neutralize" should mean "to bestow by convention a neutral character upon States, persons, and things which would or might otherwise bear a belligerent character."

Lawrence says:²³

In ordinary neutrality there are two elements — the element of abstention from acts of war, and the element of freedom to abstain or not to

²¹ The Neutralization Features of the Hay-Pauncefote Treaty, cited above.

²² Studies in International Law, pp. 271 and 275.

²³ The Principles of International Law, sec. 245, pp. 485 and 486.

abstain at pleasure. Take away the latter and we obtain neutralization. A neutral state can, if it pleases, cease to be neutral and join in the war. * * * Neutralized states, persons and things, occupy exactly the same position towards hostilities actually in progress as neutral states, persons or things; but they differ from the latter in that they are bound by international agreement to take no part in warlike acts, and are protected from warlike operations as long as they respect this obligation.

So great a change in their legal position cannot be made without the consent of all parties affected thereby. A power is incapable of neutralizing its territory by its own mere declaration, because the rights and duties of other powers would be altered considerably by such neutralization, and their consent must therefore be obtained before it can be legally carried out. Similarly two or three powers are incapable of neutralizing the territory of one of their number; for they have not authority to legislate for the civilized world, and to warn other powers off a spot where belligerent operations could previously be carried on by all who chose to go to war with the state which owned it. The common law of nations cannot be overridden by the *ipse dixit* of one of the communities subject to it, or even by a group of them. The change, if it is to be internationally valid, must be the result of a general agreement. At the very least it must be accepted by all the important states concerned in the matter. Any smaller number may bind themselves to one another to protect a territory from hostile operations; but they cannot alter its international *status*, or render an attack upon it an offence against the public law of the civilized world.

Wharton says: ²⁴

It is to be observed that the word "neutrality" in the convention of 1846, is not used in the technical sense of "neutralization." "Neutralization" * * * is the assignment to a particular territory or territorial water of such a quality of permanent neutrality in respect to all future wars as will protect it from foreign belligerent disturbance. This quality can only be impressed by the action of the great powers by whom civilized wars are waged and by whose joint interposition such wars could be averted. As the "neutrality" of the Isthmus is, by the convention before us, guaranteed only by the United States, it is not a neutralization in the above sense, but only a pledge and guarantee of protection.

For other references in this connection see *Annuaire de l'Institut de Droit International*, 1878-9; *Manuel de Droit International Public*, Bonfils, 1905, secs. 1443 and 348, 349, 359, 361; *America's Foreign Policy*, Woolsey, 1898, pp. 147-9; *American Diplomatic Questions*, Henderson, 1901, pp. 179-81.

²⁴ International Law Digest, Vol. II, sec. 145, p. 114.

After quoting Holland and Lawrence, in part as above, and briefly mentioning well-known cases of neutralization, Latané goes on to say:

It follows, from a study of the foregoing cases, that neutralization implies:— (1) a formal act or agreement. It is a matter of convention constituting an obligation—not a mere declaration revocable at will. (2) It implies a sufficiently large number of parties to the act to make the guaranty effective. (3) It implies absence of fortifications. The mere existence of fortifications would impeach the good faith of the parties to the agreement.²⁵ (4) It implies certain limitations of sovereignty over the territory or thing neutralized. (5) It implies a more or less permanent condition. In this it differs from ordinary treaty stipulations terminated by war between the contracting parties. A treaty establishing neutralization is brought into full operation by war.

When we come to extend the same principle to waterways, however, we find the conditions to be altogether different. The first and most fundamental difference is that States have acquired by international usage and prescription, rights and interests in the territorial waters of other States which they have no claim to exercise in respect to land. Secondly, armies and implements of war are absolutely excluded from the territory of neutralized States, while neutralized waterways are by design open to the innocent passage of warships, not only in time of peace but also in time of war. Thirdly, the warfare of the future will in all probability be confined more and more to the sea, thus enhancing the strategical value of waterways and canals which are adjuncts to the high seas as well as increasing the temptation to appropriate them for national purposes.²⁶

IV.

The Suez and Panama Canals are waterways in a class by themselves having these points of similarity: each is an artificial passage through an isthmus connecting two continents; by each many sea routes are shortened thousands of miles; each lies entirely within the territory of a weak power, unable to protect it. Had either been wholly within the territory of a strong power, able to finance and construct it, and to protect it afterward, there can be little doubt of its status, which would have been just what that strong power chose to make it. There are points of dissimilarity also, one being that, whereas the Suez Canal was financed and constructed by a private company, of which the Government of Great Britain is now,

²⁵ The statement of (3) is open to discussion, but is quoted here as written.

²⁶ The Neutralization Features of the Hay-Pauncefote Treaty, cited above.

but was not originally, a shareholder, the Panama Canal is entirely a government enterprise of the United States. Another is the comparative proximity of the Suez Canal to several powerful European nations, while an ocean separates the Panama Canal from all nations of the first class except the United States. A third is the fact of the paramount interest of the United States in the Panama Canal because of its relation to communications between the Atlantic and Pacific coasts. President Hayes' remark that a canal on the Isthmus is virtually a part of our coast line has taken over twenty years to be impressed in its full significance upon the American public; but it has been so impressed at last, resulting in governmental finance, construction and control. It is true that Great Britain has far greater interest in the Suez Canal than any other power because of her tremendous commerce and the defense of her eastern possessions; but her interest is bound up with the Suez Canal in an entirely different way from that of the United States in the Panama Canal. Her great concern is in free passage for her commerce, and neutralization of the Canal is to her great advantage. A nation standing across the Mediterranean at its narrowest part, and commanding the entrance to the Red Sea from Perim Island and Aden, need not worry unduly about the actual use of the Suez Canal proper by an enemy power. At the meeting of delegates in Paris in 1885 (to consider the financial position of Egypt), the Russian delegate, M. Hirovo, maintained that

the treaty would be illusory unless the approaches of the canal were made to comprise a neutral passage through the Red Sea into the Gulf of Aden. (See *International Law*, Westlake, Part I, p. 328.)

In spite of the dissimilarities in the two cases, the status of the Suez Canal is the only practical precedent with which to study that of the Panama Canal, and hence the former must be thoroughly understood. The early history of the Suez Canal may be briefly stated. It was built by a company organized by de Lesseps under a firman granted in 1856, and was opened in 1869. During this period the British Government's attitude was one of uncompromising hostility, and eminent British engineers and the British press had declared its impracticability, or its commercial failure if completed.

As soon as it had justified itself, however, Great Britain was not slow to recognize her interest in it, and when Egyptian embarrassments placed upon the market the shares held by the Khedive the British Government purchased them in 1875, thus becoming the largest shareholder. In 1882 occurred the revolt of Arabi, attended by the massacre at Alexandria. Upon Great Britain alone fell the task of restoring order, though she invited France and Italy to undertake it with her. Both declined, and the action of France in particular was short-sighted, as shown by subsequent events. Great Britain's forces occupied Egypt, and she has not seen the way clear as yet to withdraw her troops. This naturally has been a source of irritation to France until, in 1904, the matter was adjusted by the Anglo-French *entente*, in which it was one of a number of questions amicably settled by mutual concessions.

When the Suez Canal was constructed there was no precedent upon which to base its status with respect to free navigation, and we may therefore expect to find an evolution of sentiment in this regard. The firman of 1856 said, in Article XIV:

We solemnly declare, for us and our successors, subject to the ratification of His Imperial Majesty, the Sultan, the Grand Maritime Canal from Suez to Pelusium, and its dependent ports, open forever as neutral passages to all ships of commerce passing from one sea to the other.
* * *

This was repeated in another firman ten years later, in which, by Article 10, the Egyptian Government reserved the right of occupying every position or strategical point which it should deem necessary for the defense of the country, such occupation not to obstruct the navigation. * * *

The Sultan confirmed this firman in March, 1866.

When the Canal was opened it was thus territorial water, and in the charter granted by the sovereign power, a weak one, to the foreign constructing and operating company, the only stipulation regarding free use referred to merchant vessels alone. But it was used by the war vessels of both belligerents in the Franco-Prussian War without complaint, though no formal stipulation had been made by the Porte allowing its use by any war vessels whatever.

In 1873 the international movement toward a definitive agreement

about the Canal began when the Sultan invited an international commission to sit at Constantinople. Its object was to arrange a schedule of dues, about which disputes had arisen, and in its scale dues for men-of-war and transports were inserted without any exception of belligerents. Nys quotes one of its resolutions as follows: désormais la navigation du Canal de Suez serait commune aux bâtiments de commerce, aux bâtiments de guerre et aux bâtiments affrétés pour le transport des troupes.

The declaration was signed by the representatives of all the maritime powers of Europe except Portugal, by the Porte, and by the Canal Company, and was proclaimed by the Porte in December of that year.

But the question was not considered satisfactorily settled, for no provision in precise terms covered the case of a war in which the Porte might be a belligerent, and discussion went on. In 1875, the same year in which Great Britain became a shareholder, Sir Travers Twiss proposed the neutralization of the Canal, and the subject was considered by the Institute of International Law, which adopted a proposed international declaration in 1879. Meantime, in 1877-8 occurred the Russo-Turkish War in which Turkey was a belligerent, and the British Government early in 1877 seized the occasion to announce at a meeting of the shareholders, and to send a communication of the same import to the Russian ambassador, that

An attempt to blockade or otherwise interfere with the canal or its approaches would be regarded by Her Majesty's government as a menace to India and a grave injury to the commerce of the world. On both these grounds any such step, which they hope and believe there is no intention on the part of either belligerent to take, would be incompatible with the maintenance by them of an attitude of passive neutrality. * * * Her Majesty's government are firmly determined not to permit the canal to be made the scene of any combat or warlike operations.

Russia replied that

the Imperial cabinet will neither blockade nor interrupt, nor in any way menace, the navigation of the Suez Canal.

Great Britain also sent an intimation of the same nature to the Porte and the Khedive. In May, 1877, de Lesseps made a propo-

sition to the British Government for the neutralization of the Canal, to which Lord Derby replied that the proposal was "open to so many objections of a political and practical character" that the British Government could not undertake to recommend it.

The Porte's adoption of the work of the international commission of 1873, England's attitude in 1877, and Russia's acquiescence, together constituted a status, by general understanding but not by convention, that no hostilities nor warlike operations should take place in the Canal, that its mouths should not be subject to blockade, that on such a footing the Canal should be free to ships of war of belligerents, and that Turkey, if a belligerent, should stand on the same footing in this regard as other powers. When Great Britain intervened single-handed in Egypt in 1882, she occupied the line of the Canal, but it was not in violation of the spirit of this understanding, for she undertook her task singly only after failing to get the co-operation of France and Italy, she did it under the authority and in the interest of the Khedive, and one great object was to protect the Canal itself.

But it was evident that the status of the Canal virtually in the control of the strongest maritime power of the world, as was the case after Great Britain's intervention and especially after the refusal of that country to share again with France the dual control in Egypt that had existed prior to 1882, could not be satisfactory to the other powers. Great Britain recognized the necessity for a definite conventional agreement in 1883 when (January 3) Lord Granville addressed a circular note to the great European powers suggesting a series of rules as a basis

to put upon a clearer footing the position of the Canal for the future, and to provide against possible dangers,

thus reversing the position taken by Lord Derby in 1877. Lord Granville's dispatch bore little fruit until early in 1885, when the representatives of the great powers met in London to reconsider the financial position of Egypt. Among other things their Declaration provided for a commission to meet in Paris March 30 for the preparation of an act for

the establishment of a definitive regulation, guaranteeing at all times, and for all Powers, the freedom of the Suez Canal * * * taking for

its basis the circular of the Government of Her Britannic Majesty of January 3, 1883.

The commission met, debated, and adjourned on June 17 without reaching any conclusion. During the autumn it was

ascertained that the other Powers were ready to concur in any solution of the question in dispute which might be acceptable both to Great Britain and France. Negotiations were accordingly resumed between those Powers on November 12, and a Convention was signed on their behalf at Paris, on October 24, 1887, which after receiving the approval of the other Powers in succession, that of the Porte being delayed till June 29, 1888, was eventually signed at Constantinople on October 29, by the Plenipotentiaries of the nine Powers, and was ratified on December 22, 1888.²⁷

Westlake, Part I, p. 328, says:

The ratifications were deposited at Constantinople on 22 Dec. 1888, but not exchanged.

This statement is not verified by any reference at hand, though it is intrinsically probable for reasons that will now appear. At the last sitting of the Commission at Paris on June 13, 1885, Sir Julian Pauncefote made the following reservation on the part of his government:

The delegates of Great Britain, in presenting this text of a treaty as the definitive régime intended to guarantee the free use of the Suez Canal, consider it their duty to formulate a general reservation as to the application of its provisions in so far as they would not be compatible with the transitory and exceptional state in which Egypt now exists and as they might fetter the freedom of action of their government during the occupation of Egypt by the forces of Her Britannic Majesty.

This reservation was repeated by Lord Salisbury before the convention was signed in 1887, and carefully brought to the knowledge of all the powers concerned. On July 12, 1898, Mr. Cruzon replied in Parliament to a question:

The Convention in question (that of Constantinople, 1888) is certainly in existence, but * * * has not been brought into practical operation. This is owing to the reserves made on behalf of Her Majesty's Government by the British delegates at the Suez Canal Commission in 1885, which were renewed by Lord Salisbury, and communicated to the Powers in 1887.

²⁷ Studies in International Law, Holland, p. 288.

Here is a condition short of complete fulfilment of the terms of the convention, and it may very possibly have prevented the exchange of the ratifications. The terms of the convention are given below, and it will be observed that the word "neutralization" does not occur. The convention was signed by representatives of Great Britain, Germany, Austria, Spain, France, Italy, the Netherlands, Russia and Turkey.

The preamble recites that the several rulers wishing to establish, by a Conventional Act, a definite system destined to guarantee at all times, and for all the Powers, the free use of the Suez Maritime Canal, and thus to complete the system under which the navigation of this Canal has been placed by the Firman of His Imperial Majesty the Sultan, dated the 22nd February, 1866 (2 Zilkade, 1282), and sanctioning the Concessions of His Highness the Khedive, have named as their Plenipotentiaries * * * who * * * have agreed upon the following Articles:—

ARTICLE I.

The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag.

Consequently, the High Contracting Parties agree not in any way to interfere with the free use of the Canal, in time of war as in time of peace.

The Canal shall never be subjected to the exercise of the right of blockade.

ARTICLE II.

The High Contracting Parties, recognizing that the Fresh-Water Canal is indispensable to the Maritime Canal, take note of the engagements of His Highness the Khedive towards the Universal Suez Canal Company as regards to the Fresh-Water Canal, which engagements are stipulated in a Convention bearing date the 18th March, 1863, containing an *exposé* and four Articles.

They undertake not to interfere in any way with the security of that canal and its branches, the working of which shall not be exposed to any attempt at obstruction.

ARTICLE III.

The High Contracting Parties likewise undertake to respect the plant, establishments, buildings, and works of the Maritime Canal and of the Fresh-Water Canal.

ARTICLE IV.

The Maritime Canal remaining open in time of war as a free passage, even to the ships of war of belligerents, according to the terms of Article

I of the present Treaty, the High Contracting Parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the Canal, shall be committed in the Canal and its ports of access, as well as within a radius of 3 marine miles from those ports, even though the Ottoman Empire should be one of the belligerent Powers.

Vessels of war of belligerents shall not revictual or take in stores in the Canal and its ports of access, except in so far as may be strictly necessary. The transit of the aforesaid vessels through the Canal shall be effected with the least possible delay, in accordance with the Regulations in force, and without any other intermission than that resulting from the necessities of the service.

Their stay at Port Said and in the roadstead of Suez shall not exceed twenty-four hours, except in case of distress. In such case they shall be bound to leave as soon as possible. An interval of twenty-four hours shall always elapse between the sailing of a belligerent ship from one of the ports of access and the departure of a ship belonging to the hostile Power.

ARTICLE V.

In time of war belligerent Powers shall not disembark nor embark within the Canal and its ports of access either troops, munitions, or materials of war. But in case of an accidental hindrance in the Canal, men may be embarked or disembarked at the ports of access by detachments not exceeding 1,000 men, with a corresponding amount of war material.

ARTICLE VI.

Prizes shall be subjected, in all respects, to the same rules as the vessels of war of belligerents.

ARTICLE VII.

The Powers shall not keep any vessel of war in the waters of the Canal (including Lake Timsah and the Bitter Lakes).

Nevertheless, they may station vessels of war in the ports of access of Port Said and Suez, the number of which shall not exceed two for each Power.

This right shall not be exercised by belligerents.

ARTICLE VIII.

The Agents in Egypt of the Signatory Powers of the Present Treaty shall be charged to watch over its execution. In case of any event threatening the security or the free passage of the Canal, they shall meet on the summons of three of their number under the presidency of their Doyen, in order to proceed to the necessary verifications. They shall inform the Khedivial Government of the danger which they may have perceived, in order that that Government may take proper steps to insure

the protection and the free use of the Canal. Under any circumstances, they shall meet once a year to take note of the due execution of the Treaty.

The last-mentioned meetings shall take place under the presidency of a Special Commissioner nominated for that purpose by the Imperial Ottoman Government. A Commissioner of the Khedive may also take part in the meeting, and may preside over it in case of the absence of the Ottoman Commissioner.

They shall especially demand the suppression of any work or the dispersion of any assemblage on either bank of the Canal, the object or effect of which might be to interfere with the liberty and the entire security of the navigation.

ARTICLE IX.

The Egyptian Government shall, within the limits of its powers resulting from the Firmans, and under the conditions provided for in the present Treaty, take the necessary measures for insuring the execution of the said Treaty.

In case the Egyptian Government should not have sufficient means at its disposal, it shall call upon the Imperial Ottoman Government, which shall take the necessary measures to respond to such appeal; shall give notice thereof to the Signatory Powers of the Declaration of London of the 17th March, 1885; and shall, if necessary, concert with them on the subject.

The provisions of Articles IV, V, VII, and VIII shall not interfere with the measures which shall be taken in virtue of the present Article.

ARTICLE X.

Similarly, the provisions of Articles IV, V, VII, and VIII shall not interfere with the measures which His Majesty the Sultan and His Highness the Khedive, in the name of His Imperial Majesty, and within the limits of the Firmans granted, might find it necessary to take for securing by their own forces the defence of Egypt and the maintenance of public order.

In case His Imperial Majesty the Sultan, or His Highness the Khedive, should find it necessary to avail themselves of the exceptions for which this Article provides, the Signatory Powers of the Declaration of London shall be notified thereof by the Imperial Ottoman Government.

It is likewise understood that the provisions of the four Articles aforesaid shall in no case occasion any obstacle to the measures which the Imperial Ottoman Government may think it necessary to take in order to insure by its own forces the defence of its other possessions, situated on the eastern coast of the Red Sea.

ARTICLE XI.

The measures which shall be taken in the cases provided for by Articles IX and X of the present Treaty shall not interfere with the free use of

the Canal. In the same cases, the erection of permanent fortifications contrary to the provisions of Article VIII is prohibited.

ARTICLE XII.

The High Contracting Parties, by application of the principle of equality as regards the free use of the Canal, a principle which forms one of the bases of the present Treaty, agree that none of them shall endeavour to obtain with respect to the Canal territorial or commercial advantages or privileges in any international arrangements which may be concluded. Moreover, the rights of Turkey as the territorial Power are reserved.

ARTICLE XIII.

With the exception of the obligations expressly provided by the clauses of the present Treaty, the sovereign rights of His Imperial Majesty the Sultan, and the rights and immunities of His Highness the Khedive, resulting from the Firmans, are in no way affected.

ARTICLE XIV.

The High Contracting Parties agree that the engagements resulting from the present Treaty shall not be limited by the duration of the Acts of Concession of the Universal Suez Canal Company.

ARTICLE XV.

The stipulations of the present Treaty shall not interfere with the sanitary measures in force in Egypt.

ARTICLE XVI.

The High Contracting Parties undertake to bring the present Treaty to the knowledge of the States which have not signed it, inviting them to accede to it.

The express and only reason given by Great Britain for any reservations was the "transitory and exceptional state" of Egypt. That "state" exists still so far as the continued occupation of Egypt by Great Britain goes, but the conditions are now entirely changed by the Anglo-French *entente*. At the time the Constantinople Convention was concluded the British occupation of Egypt was bitterly opposed in France, and to this opposition may be traced the reservations made by Great Britain. When, however, France and Great Britain came to a happy understanding in 1904, the occupation of Egypt was acquiesced in by France — virtually confirmed — so long as Great Britain considers it to her interest to remain. Hence,

as Great Britain's chief concern in Egypt was with France when the Constantinople Convention was concluded, the arrival at the understanding of 1904 made it no longer necessary to hold to the reservations of 1885 and 1887. This is borne out by the statement made on August 8, 1904, by Earl Percy in the House of Commons, replying to a question addressed to the Under Secretary for Foreign Affairs. He remarked that Germany, Austria-Hungary and Italy have

undertaken not to obstruct the action of Great Britain in Egypt by asking that a limit of time be fixed for the British occupation, or in any other manner, and agreed that the execution of the last sentence of par. 1, as well as all of par. 2 of Art. VIII of the Treaty of October 29, 1888, shall remain in abeyance.²⁸

The Anglo-French Declaration²⁹ was made on April 8, 1904. Article I says in part:

His Britannic Majesty's Government declare that they have no intention of altering the political status of Egypt. The Government of the French Republic, for their part, declare that they will not obstruct the action of Great Britain in that country by asking that a limit of time be fixed for the British occupation or in any other manner. * * *

Article VI reads:

In order to insure the free passage of the Suez Canal, His Britannic Majesty's Government declare that they adhere to the stipulations of the Treaty of October 29, 1888, and that they agree to their being put in force. The free passage of the Canal being thus guaranteed, the execution of the last sentence of paragraph 1 as well as of paragraph 2 of Article VIII of that Treaty will remain in abeyance.

The last sentence of Article VI constitute a further exception, but a reference to the subject referred to shows that the matter is unimportant: the principle of Article VIII is conserved, the annual meeting remaining in abeyance, as it has remained since 1888. As for the broad stipulations of the treaty, Great Britain not only declares its adherence, but its agreement to their being put in force. The language is plain and unequivocal, and there is no apparent reason to doubt Great Britain's good faith or impute to her any

²⁸ *London Times*, August 9, 1904.

²⁹ *International Law*, Oppenheim, Vol. I, p. 587, Appendix.

arrière pensée. If the text alone does not carry conviction, it may be worth while to compare the language of its terms with that used by Mr. Curzon in Parliament in reply to an interpellation (see p. 344, *supra*). There it was said of the Constantinople Convention that it "has not been brought into practical operation." In Article VI of the Anglo-French Declaration the British Government

declare that they adhere to the stipulations of the Treaty of October 29, 1888, and that they agree to their being put into effect.

The Marquess of Lansdowne, in a dispatch to the British Ambassador at Paris dated April 8, 1904, enclosing the draft of the Anglo-French Declaration of the same date, said:

It will be observed that an Article has been inserted in the Agreement declaring the adhesion of His Majesty's Government to the Treaty of the 29th October, 1888, providing for the neutrality of the Suez Canal in time of war. In consequence of the reservations made by Lord Salisbury at the time respecting the special situation of this country during the occupation of Egypt, some doubt existed as to the extent to which Great Britain considered herself bound by the stipulations of the Convention. It appears desirable to dissipate any possible misunderstanding by specifically declaring the adhesion of His Majesty's Government. It is, however, provided that certain executive stipulations which are incompatible with Lord Salisbury's reservations should remain in abeyance during the continuance of the occupation.³⁰

The understanding of Great Britain's present attitude toward the Constantinople Convention may be shown by quotations from well-known writers who have written since the Anglo-French Declaration. Holland says:³¹

The free passage of even belligerent war-ships through the Suez Canal is of course specially guaranteed by the Convention of 1888.

Oppenheim says:³²

But article 6 of the Declaration respecting Egypt and Morocco signed at London on April 8, 1904, by Great Britain and France has done away with this reservation.

³⁰ London *Times*, April 13, 1904; also Parl. Papers, France, No. 1, 1904, Cd. 1952.

³¹ Neutral Duties in a Maritime War, p. 2, reprint from the Proceedings of the British Academy, Vol. II, 1905.

³² Int. Law, Vol. II, p. 234, footnote.

Westlake says, after quoting Article VI of the Anglo-French Declaration.³³

so it is to be expected that the ratifications will be exchanged, if they have not already been so.

This shows the interpretation of three British authorities. The last edition of Bonfils, p. 281, notes the terms of Article VI of the Declaration. Despagne says:³⁴

A la conférence de 1885 et en signant le traité de 1888, l'Angleterre avait fait des réserves en ce qui concernait son droit de disposer du canal pour sauvegarder sa situation en Egypte tant qu'elle occuperait ce pays. Dans son arrangement général du 8 Avril 1904 art. 6 avec la France, elle a renoncé à ces réserves et accepté l'application immédiate du traité de 1888.

Professor Politis, Fellow of the Faculty of Law of the University of Poitiers and Associate of the Institute of International Law, in a discussion of the Declaration concerning Egypt and Morocco, after remarking that the reservations of 1885 and 1887 put the treaty at the mercy of (*à la discrétion de*) Great Britain, which could, according to her interests, permit or refuse its application, says later:³⁵

In fact the freedom of the Canal continues to remain at the mercy of Great Britain.

There can be no doubt of this, considering Great Britain's sea power and her situation in Egypt, but his next words signify what he considers its status in law since the Anglo-French Declaration. He continues:

Mais on peut dire qu'en droit, le régime du canal se trouve fortifié et mis hors de doute, par la cessation de tout malentendu au sujet du caractère obligatoire de la convention de Constantinople.

Nys does not mention either the reservations or their renunciation, but his work on *International Law*, though its publication began in 1904, must have been written too early for the latter. Enough has been quoted to show the understanding of well-known Continental authors as to the present status of the Constantinople Convention.

³³ Int. Law, Pt. I, pp. 328-329.

³⁴ Cours de Droit International Public, 1905, pp. 503-504.

³⁵ Revue Générale de Droit International Public, Tome XI, 1904, p. 697.

As has before been stated, there is no sufficient reason to doubt Great Britain's good faith in the Declaration of April 8, 1904. Her supreme interest is in absolute freedom of traffic for her merchant vessels and men-of-war, which the Convention of 1888 guarantees; her understanding with France removes any anxiety about her occupation of Egypt; and it is not difficult to imagine her freedom from care regarding the use of the actual waters of the Canal and its approaches by the warships of any future enemy, situated as she is at Malta and the mouth of the Red Sea.

We may, therefore, regard the Constantinople Convention in full effect. It remains to consider how far the Canal is "neutralized" by that convention, in the sense of the word as developed in Part III. Taking Latané's summary, p. 339, *supra*, point by point, it appears that:

(1) The Constantinople Convention is a formal act between nine powers of Europe, including all the great European maritime powers, and its terms specify perpetuity; hence it is not revocable at will except by the concurrence of all the signatory powers, or by *force majeure*.

(2) The signatory powers include all the great military powers of Europe. This fact should make the guaranty effective so far as any pact can to which the several nations have pledged their faith.

(3) Fortifications are forbidden (Articles VIII and IX), and Article VII is along the same precautionary line.

(4) There is a limitation of full rights of sovereignty in the mere fact that Turkey expressly surrenders for herself certain rights she would otherwise have as a belligerent, and gives by convention to her possible future enemies certain rights they could only have otherwise by force, in waters lying entirely within her territorial limits; and also in the provisions of Article VIII and Article IX.

(5) The word "always" in Article I, the provisions of Article XV, and the fact that the words "in time of war" occur repeatedly in the instrument, all go to establish a permanent condition, and one brought into complete operation by a state of war.

Considering next Latané's extension of the principle of neutralization to waterways, his first and third points are covered by the

existence of the Constantinople Convention itself, the concurrence of many powers being as great a preventive as possible against "the temptation to appropriate them (the Canal) for national purposes." The second point has some application. French writers quite generally say that the Canal is not "neutralized" by the Convention because the passage of belligerent ships is permitted, and Westlake makes a similar remark (Part I, p. 330, footnote). This is undoubtedly true, considering the neutralization of the Canal on a strict parallel with the neutralization of territory. But when the difference between the laws of land warfare and maritime warfare is taken into account, it may safely be said that the Suez Canal is neutralized. Without bad faith no signatory power can appropriate the Canal to its sole use for belligerent purposes, or take steps to forbid the passage of the warships of its enemy; and the combined influence of the signatory powers will doubtless discourage non-signatory powers from any such attempt. Thus the Suez Canal is neutralized although the word "neutralization" does not occur in the Convention of 1888, the idea being conveyed by such terms as "free and open," "free use," "open in time of war" and "principle of equality," as well as by the prohibitions of the instrument. It is interesting here to note Lord Granville's instructions to the British delegates to the Paris Commission in his dispatch of May 2, 1885:

In order to prevent future misapprehension as to the views of Her Majesty's Government with regard to the Suez Canal, I have to request you to be careful during the discussion attending the preparation of the draft regulations regarding the canal, to avoid the use of the word "neutrality" as applied to the canal, and to adhere to the term "freedom" or "free navigation," as used in the declaration of the 17th March, and in my circular dispatch of the 3rd January, 1883.

Although the delegates replied to Lord Granville's caution that there would be no danger in the use of the word neutrality

inasmuch as there has been common accord from the first that the term, as applied to the canal, had reference only to the neutrality which attaches by international law to the territorial waters of a neutral state in which a right of innocent passage for belligerent vessels exists, but no right to permit any act of hostility,

yet his view prevailed in the finished instrument. The question naturally arises whether the growth of sentiment in the succeeding

years is sufficient to account for the use of the word "neutralization" in the ratified treaty concluded by Lord Pauncefote with Mr. Hay.

Turning now to that treaty, and applying the same criteria as have been used above, it appears:

(1) There is a formal act of agreement between the United States and Great Britain, and another, hinging on the first, between the United States and Panama; but these are all. In case of war with Great Britain the former treaty would go to the winds.

(2) There is a lack of sufficient number of states, conventionally bound, to make the treaty effective if the United States wishes to abrogate it by notice, or if it is automatically abrogated by war with Great Britain. This is not to say that a coalition *could not force* the United States to take a desired line of action, but simply that no states are pledged to such collective action by treaty engagements.

(3) Fortifications are not forbidden by the treaty, and the circumstances attending the omission of the prohibition from the final draft of the treaty have been noted above. Further, in the treaty with Panama the United States explicitly reserved the right to fortify, giving an additional notice to the world, if one were needed, as to her attitude regarding this particular right.

(4) There is a limitation of the sovereignty of the territorial power, which by the terms of the treaty with Panama, concluded exactly two years after the Hay-Pauncefote Treaty, descends in some manner to the United States, *so long as the latter treaty stands*. But these limitations are far from going to the extent of those established in the Constantinople Convention. Moreover, by the terms of Panama's treaty with the United States the limitations upon the former's sovereignty are yielded to one nation only, and that a powerful one, which virtually assumes a protectorate of Panama; Egypt, on the other hand, is a suzerainty of Turkey, and not an independent state, and the limitations of sovereignty imposed by the Constantinople Convention are upon Turkey, herself a weak state, and are yielded to all the great states of Europe acting in concert.

(5) The permanency of the treaty as toward Great Britain exists as long as we are at peace with her, and ceases whenever we choose

to engage her in war. To other nations, its provisions are simply a declaration of intentions. Beyond equality of treatment no other nation has a right to hold us to an observance of the Rules.

Thus in essential particulars the Hay-Pauncefote Treaty does not, and can not, establish "neutralization." Using the word, the treaty fails to secure the fact in any exact sense, in which it is precisely the reverse of the Convention of 1888. It is unfortunate that the word should have been used at all, and it is regrettable that the distinguished American negotiator did not, both in this treaty and the later one with Panama, take his guide from Lord Granville's letter of instructions in 1885 to the delegates to the Paris Commission. The reason why the British negotiator allowed the use of the word is not difficult to see. But with or without the word, the Hay-Pauncefote Treaty does not establish the neutralization of the Panama Canal.

Reviewing this phase of the question before us it is evident that the status of the Suez Canal as regards neutralization does not furnish any real precedent for that of the Panama Canal. The former status rests upon a convention that is international in the broad sense of being subscribed to by a sufficient number of powerful states to enforce its provisions against the world, and a convention in which the rules governing neutralization are declared by those states jointly. The latter status rests upon the provisions of the Hay-Pauncefote Treaty (upon which the treaty with Panama hinges), which is international only in the narrow sense that more than one nation is a signatory power. Moreover, even in that treaty the language is: "The United States adopts * * *." It only remains to add that the Constantinople Rules were not adopted until nearly twenty years after the opening of the Suez Canal, during which its free use for navigation gave to the users a sort of prescriptive interest that had its great effect during the formulation of the Rules; the Rules for the use of the Panama Canal will not go into effect for a decade to come.

V.

In the summer of 1906 the writer was much impressed by a remark made by a gentleman whose long and distinguished public service entitles his words to great respect. He said, in effect, that

in reality there is no such thing between nations as friendship, beyond the limits of self-interest. Within a twelve-month another gentleman of similar long and distinguished public service said the same thing, and in almost the same words, in a public speech. To one who heard both, the language was so much alike as to be startling. The idea expressed is, of course, at the bottom of our reason for the maintenance of national military forces, but it is rarely heard in such concrete expression; and if appreciated at all, it is not fully realized by those who, on the one hand, hope to secure peace by conventions, or, on the other, rely for the maintenance of our prestige and national safety upon our potential strength, or worse yet upon bombast, which is the daughter of ignorance. The recent humiliation of Russia has given ample evidence of the insufficiency of potential strength, and of the danger that lies in a contempt of the adversary based upon ignorance.

The United States has acquired — for herself alone — far-reaching rights in Panama. By that very fact she has assumed single-handed equally far-reaching obligations, for rights entail obligations. One of these obligations is the protection of the Canal, and the question must be met how that protection is to be extended. Were the Canal really neutralized, its protection might be held to lie in the moral force exerted by a union of powerful states bound together to maintain its neutralization. But it has been pointed out that the United States is the sole sponsor for the Canal, and the contention is made that the Canal is, therefore, not neutralized. If that contention be admitted it has a great bearing on the protection of the Canal. How shall we maintain our rights there, or discharge our obligations, if some powerful nation shall feel strong enough to gainsay our pretensions at a future day? There is no answer apparent, consistent with our attitude, that leaves out military force.

This again leads to other questions. In what form shall military force be manifested? Shall the defense of the Canal be a navy function, or an army function, or shall it devolve upon both services? Shall there be permanent fortifications? It has been held in some quarters that no permanent fortifications are needed for the defense of the Canal, which will be sufficiently guaranteed by the navy. To

the mind of the writer this is a grievous error; he firmly believes that no complete defense of the Canal is possible that leaves out either service, but that the defense of the Canal is primarily an army function and only incidentally a navy function, and that permanent fortifications are a necessity. Not to have permanent fortifications at the Canal will operate to tie the navy to the Canal region in war, and that will mean partial paralysis. The navy must be free to go where it can do the most good, and without any drag upon its freedom of action due to a knowledge that in going it may have to leave open vital interests dependent upon it alone. The Canal zone needs permanent fortifications just as truly as does New York City. With them, if the navy be near, it will add greatly to the defense; but if the best interests of the country call it far away the Canal will still be amply protected.

The attitude of the United States toward other nations is one of saying virtually: "Hands off! The Canal is the affair of this nation alone." If the Canal zone be unfortified and ungarrisoned, that attitude is merely bluff. It is the writer's conviction that the United States will fail in its manifest duty if it neglects to fortify the Canal.³⁶

VI.

In what precedes certain facts have been presented and certain opinions advanced regarding the status of the Panama Canal. In conclusion the principal of these are summarized as follows:

The facts are:

(1) The Canal is owned by the United States Government, as permitted by the Hay-Pauncefote Treaty. There is no company, there are no shares, and hence no foreign government or citizen has any vested property rights in the Canal, the treaty rights guaranteed to Panama alone excepted.

(2) The "construction, maintenance, operation, sanitation and protection" of the Canal belong exclusively to the United States Government.

³⁶ It may be added in this connection that the United States guarantees the independence of Panama, though no mention of the bearing of this guarantee on the question of fortification was made in the original paper. — H. S. K.

(3) Commercial freedom of transit is guaranteed. That transit in time of war is included is evident from the Rules relating to belligerents.

(4) Free transit of vessels of war is guaranteed. That transit in time of war is included is evident from the Rules relating to belligerents.

(5) By implication, due to the absence of prohibitions in the Hay-Pauncefote Treaty, the United States has the right to fortify the Canal. By specific stipulation in the Hay-Bunau-Varilla Treaty she has that right, and in that stipulation has proclaimed her belief that the right exists. Further, this right is affirmed by the so-called Spooner Act of June 28, 1902, which, though a domestic law, is open to be read by the world.

The opinions are:

(1) The Canal is not neutralized in any proper sense of the word.

(2) The free transit of vessels of war in time of war can not be held to apply to enemies of the United States when the United States is a party to the war. If Great Britain should ever become hostile, the treaty establishing the Rules would be suspended by the existence of war; with other possible maritime enemies the United States has no treaty.

(3) It is the duty of the United States to erect and garrison permanent defenses for the protection of the Canal.

H. S. KNAPP.

THE "ACT OF STATE" DOCTRINE

The field of international law in general is sharply demarked from that of municipal law, but it is the individuals, composing the population of the various states and nations, who furnish the points of contact where international friction may be generated. With the claims of a citizen or subject against his own government, and its officers and agencies, international law naturally has nothing to do. But when an individual asserts a claim against a government not his own, or against the individuals who carry on its operations, such a claim falls on one side or the other of the boundary between international law and municipal law, according to whether the claimant has or has not an adequate remedy in the ordinary courts of the state against which the claim exists. If he has, it is unusual for his own nation to take any cognizance of the matter at all. If he has not, it is then for his own nation to determine whether to make the cause of the individual the cause of the nation. If it so determine, the boundary line is crossed, and the individual grievance becomes a matter of international adjustment and discussion, which may extend even to the arbitrament of war. In this way, what is really a mere cause of action may become a *casus belli*.

One of the most notable results of increasing civilization has been the ever-growing recognition of the rights of the stranger. The more completely such rights are recognized and vindicated by the internal authorities and tribunals, the less occasion there is for resort to external diplomatic pressure, and the less danger there is of international friction.

Thus the development of municipal law upon this subject has an important bearing upon international law. The phase of this development now to be discussed is the so-called "Act of State" doctrine, particularly as exemplified by certain decisions of the courts of England and the United States.

This doctrine may be briefly and baldly stated as follows: An act, which would otherwise be an actionable wrong, may be so

authorized or adopted by a government as to make it an "Act of State" for which no individual is personally liable, and for which the government can be made responsible only through its own grace or through international recourse. The broader the application of this doctrine becomes, the more cases there will be in which an individual with a real or fancied grievance will find himself unable to secure a judicial determination of the justice of his claim, and thus the larger will be the possible field of international dispute.

Practically all civilized nations provide some method by which claims of a contractual nature against their governments may be presented for determination by a judicial tribunal. Where this remedy is extended to foreigners, as it usually is, and where the tribunal is an independent court of justice, free from executive domination, there is nothing for international cognizance, even if error be committed or injustice done in a particular case. But where the claim "sounds in tort," there is usually no recourse against the government in its own courts, and the only remedy is against the individual officer who performed or directed the act complained of, leaving to his government the duty to indemnify him in a proper case through extra-judicial channels. This course is somewhat circuitous, and imposes upon a successful claimant the risk of losing the fruits of his victory if the nominal defendant is execution-proof and the government does not see fit to provide an indemnity for the claimant's benefit. In the long run, however, it probably works out as near an approach to substantial justice as any other legal machinery. The theory is apparently this: the king — or the state — can do no wrong, but the individual officers who administer the government may and not infrequently do. When they do so, they are responsible to the person injured, but if their acts were done in good faith in the service of the state, the state will make good the loss of its servants. So far so good; but here sometimes comes in, as an obstacle to justice, the "Act of State" doctrine, to relieve the individual without subjecting the government to any liability except in the international forum.

In English jurisprudence, this doctrine seems to have been very broadly asserted at one time by zealous Crown lawyers, and accepted

by subservient courts, even to the point of allowing a plea that the matters in controversy constituted an "Act of State" to oust the jurisdiction of the ordinary courts altogether.¹ But as the courts gradually established their independence of the executive, the doctrine received further and further limitations, until the earlier claims of complete exemption were given up and may be disregarded for the purposes of this discussion, which is intended to treat of certain present aspects of the doctrine, rather than of its historical development in detail.

One of the leading cases is *Buron v. Denman*, reported in 2 Exchequer, 166. The defendant in this case, Commander Denman of the British Navy, was carrying on a campaign against the African slave trade. In its course he burned plaintiff's slave barracoons at Gallinas on the West Coast of Africa, and liberated a large number of slaves. Gallinas was situated in territory under native control, where, "according to the evidence on both sides, it was lawful to possess slaves." Plaintiff, a subject of Spain, brought an action in trespass in the English courts. The defendant pleaded that his acts had been ratified and approved by the Admiralty, and thus adopted as an "Act of State" for which he was not personally liable. The case was tried before Baron Parke, who held that the acts complained of in themselves constituted a tort, but left it to the jury to determine the question of governmental ratification, pointing out that by such ratification

the character of the act becomes altered, for the ratification does not give the party injured the double option of bringing his action against the agent who committed the trespass or the principal who ratified it, but a remedy against the Crown only (such as it is) and actually exempts from all liability the person who commits the trespass.

The essence of this decision is well indicated by Professor Dicey in his masterly work on the English Constitution, where he says:

What the judgment in *Buron v. Denman* shows is, that an act done by an English military or naval officer in a foreign country to a foreigner, in discharge of orders received from the Crown, may be an act of war, but does not constitute any breach of law for which an action can be brought against the officer in an English Court.²

¹ See W. Harrison Moore's "Act of State in English Law," pp. 4-31.

² Law of the Constitution, 7th ed., p. 362, note 3.

This goes to the root of the matter. Where an "Act of State" injures an individual foreigner, it passes from the domain of law to the domain of force and becomes an act of war waged by a government against an individual, with somewhat overwhelming odds in the government's favor, and with no redress for the injured party even in his own courts.³ In the *Denman* case the facts may have justified the use of such methods. The British Government was carrying on what amounted to a war, not against a nation, but against an institution — slavery — which advancing civilization was sloughing off; and judicial opinion, reflecting as it always must to some extent general public opinion, gave its sanction to war measures.

Subsequent decisions by the English courts show that they have recognized the necessity of setting strict limits to this dangerous doctrine. They have accordingly held that whether or not an act done under color of office is an "Act of State" is a justiciable question, within the jurisdiction of the civil courts,⁴ and that even authorization by the Crown is no defense unless the Crown is acting within its constitutional rights.⁵

Parliamentary authorization stands on a different basis, in view of the supreme power of the British legislature, but this distinction does not apply in countries where the legislature as well as the executive is subject to constitutional limitations. The recent English cases do not squarely present the question whether an alien claimant is entitled to the same enforcement of law and measure of justice as a British subject, and it may be that the somewhat chauvinistic rule of the *Denman* case still holds. It hardly seems probable, however, that it would be applied except in a case where the controversy involved some question which was regarded as a "moral issue," like the suppression of the slave trade.

In the United States the question arose at an early stage of the nation's history, and was determined by such jurists as Marshall and Story in favor of the view that if an act was otherwise a trespass

³ *Underhill v. Hernandez*, 168 U. S. 250.

⁴ *Musgrave v. Pulido*, L. R. 5 App. Cases, Privy Council, 102.

⁵ *Walker v. Baird*, L. R. 1892 App. Cases, Privy Council, 491.

upon private rights, it could not be legalized by governmental authorization, whether from an executive department, from the President, or from the legislature acting beyond its constitutional powers.⁶ Moreover the courts adhered to the salutary principle long ago formulated by the Latin poet:

Tros Tyriusque nihi nullo discrimine agetur:

and the rights of aliens were as fully vindicated as those of citizens.⁷ Without formulating the idea in so many words, the courts apparently recognized that it was unworthy of the government to wage private war upon a defenseless individual, whether citizen or alien, and that in a state of peace a government officer could not escape the consequences of trespassing upon private rights by sheltering himself under the *ægis* of a so-called "Act of State." Thus the "Act of State" doctrine, as understood in England, found no lodgment in the structure of American jurisprudence, at least while its early builders were laying its foundations. They recognized that the government was not a self-existent or divinely anointed entity with inherent and irresponsible powers, but was itself the creature and subject of Law, the organized structure of the community, acting through individuals, each and every one of whom was bound not to violate the law to the injury of another, on peril of his individual responsibility.

After the Spanish War the "Act of State" doctrine seems to have reappeared, and was stated in a surprisingly broad form by Mr. Justice Holmes in the *Paquete Habana*,⁸ as follows:

But we are not aware that it is disputed that when the act of a public officer is authorized or has been adopted by the sovereign power, whatever the immunities of the sovereign, the agent thereafter cannot be pursued.

As applied to unquestionable acts of war, affecting persons or property having an "enemy" character, this is doubtless the only practicable rule, but to give it a wider scope involves a dangerous

⁶ *Little v. Barreme*, 2 Cranch 170; *United States v. Lee*, 106 U. S. 196; *Virginia Coupon Cases*, 114 U. S. 269; *Belknap v. Schild*, 161 U. S. 10; *United States v. Bevans*, Fed. Cas. No. 14,589.

⁷ *The Charming Betsy*, 2 Cranch 64; *Maley v. Shattuck*, 3 Cranch 458.

⁸ 189 U. S. 453, 465.

extension of the conceptions of sovereignty in a government of delegated and limited powers. In the *Paquete Habana* case, the theory of ratification was invoked for a beneficent purpose — to subject the government to liability, and not to exonerate the individual officers who had overstepped the legal limits of their powers — so that the statement quoted was purely *dictum*.

Moreover, the cases upon which it was based, with the single exception of *Buron v. Denman*, already discussed, fell far short of establishing so broad a rule. One⁹ was a case of seizure of "enemy property" during the Civil War, an act of war for which the individual military officer was properly held not to be personally liable. Another¹⁰ really went upon the ground that the British East India Company, in its governmental capacity, like one of the States of the Union, was not subject to the jurisdiction of the ordinary courts. In a third¹¹ the principle was resorted to in order to make the government liable, not to relieve any individual. And in the last¹² the only rule established was that an individual could make himself liable by ratification for the tortious act of another acting ostensibly as his servant, but without actual employment as such. The facts in the case were simply that a volunteer driver of a coal wagon, not employed by the owner of the business, but apparently seeking a little air and exercise on his own account, negligently broke a window in the course of his operations; and the owner of the business, having accepted the result of his services, and rendered a bill to his customer for the coal so delivered, was held to have become the driver's employer *nunc pro tunc* by ratification, and to be liable for the broken window. It seems rather a far cry from this grimy incident to the "Act of State" doctrine, and the delicate problems of international law.

The next and latest appearance of the doctrine was in the litigation which arose over the American Military Governor's abolition

⁹ *Lamar v. Browne*, 92 U. S. 187.

¹⁰ *Secretary of State in Council of India v. Kamachee Boye Sahaba*, 13 Moo. P. C. 22.

¹¹ *Wiggins v. United States*, 3 Ct. Cl. 412.

¹² *Dempsey v. Chambers*, 154 Mass. 330.

of the O'Reilly Slaughter House Franchise in Cuba. There it was successfully invoked to exonerate the officer without imposing any liability on the government. This case is sufficiently remarkable and interesting to warrant a somewhat detailed discussion, especially as it indicates a tendency in the courts to depart from the wholesome doctrine that in a state of peace any wrongful invasion of private rights by a government officer is at his personal peril.

The situation in Cuba at the time was anomalous, and one which would naturally give rise to numerous difficult questions of international law. The war was over, and with it had departed the unfettered sovereignty of war power. Cuba was under the control of the United States, but the government had expressly disclaimed the intention of exercising any jurisdiction or sovereignty except to preserve order and provide administrative machinery until the Cuban people could set up their own independent government and become one of the nations of the earth. Meanwhile Cuba was, as it were, a minor under guardianship — a separate entity, but not a self-directing one.

There existed in Havana at the time an ancient concession or franchise known as the *derecho de puñalada*, the "slaughter house tax," which belonged to the O'Reilly family. It had formerly been annexed to the inheritable and alienable office of *Alguacil Mayor*, or High Sheriff, of Havana. The office itself had been abolished in 1878, but the concession remained in existence until it should be condemned by the government and paid for. It consisted of the right to conduct the public slaughter house, which belonged to the municipality, and receive a certain fee for each head of cattle there slaughtered. This concession was property under Spanish law and as such apparently came within the protection of the Treaty of Paris.

One of the questions which arose in the subsequent litigation was whether this property right survived the withdrawal of Spanish sovereignty, and the Supreme Court rested its decision against the claimant in part upon the proposition that it did not, as well as upon the theory that the abolition of the concession was adopted by the government as an "Act of State" for which the officer who declared

the abolition was not personally liable. This view of the nature of the property rights involved seems so at variance with the general principles of international law, and the usage of the United States in such matters, that for the purposes of this discussion we may assume the view of the lower court, that the concession was property. It is hard to see why a franchise to conduct a slaughter house should not be recognized as property fully as much as a concession to lay cables or to pave streets, or to provide gas or water or transportation; or to collect tolls for the use of a lock, as in *Monongahela Navigation Co. v. United States*; ¹³ or why it should not receive as much protection as the rights of the Sultan of Jolo in his slaves. The fact that at one time it was annexed to a public office is hardly an adequate ground of distinction, when the office had been abolished many years before, and only the concession remained. To go into this phase of the case, however, would extend this discussion into quite another field, certain aspects of which have already been elaborately treated in this Journal from a somewhat different standpoint.¹⁴

Whether or not the O'Reilly concession was property, it was certainly an existing producer of income, and when the American authorities were engaged in putting the finances of the City of Havana upon a sounder basis, they saw in it a convenient source of revenue. General Ludlow, acting as Governor of Havana, thereupon made an order abolishing the franchise and vesting the slaughter house privilege in the city, expressly leaving to the owners the right to apply to the courts to determine their right to compensation. This procedure was a somewhat inverted variety of condemnation, but it at least recognized that the owners were entitled to some legal protection. The owners appealed to General Brooke, acting as Governor of the Island. He made an order simply abolishing the long previously abolished office of *Alguacil Mayor* with all its "rights, duties and privileges," and denying all rights asserted by the claimants. This was subsequently approved by the War Department. It was claimed by the government that it was also included in the general ratifica-

¹³ 148 U. S. 312.

¹⁴ See "Purchasable Offices in Ceded Territory," by Percy Bordwell in the January, 1909, issue of the JOURNAL (Vol. 3, p. 119).

tion by Congress of all the "acts of the United States in Cuba," contained in the so-called "Platt Amendment."¹⁵

A Spanish subject, Doña Maria Francisca O'Reilly de Camara, Countess of Buena Vista, the owner of a one-half interest in the concession, then brought suit in the United States District Court against General Brooke, under a provision giving jurisdiction "of all suits brought by any alien for a tort 'only' in violation of the law of nations or of a treaty of the United States."¹⁶ This statute was apparently designed to cover just such a case, since such a tort could hardly be committed except by a government officer, acting under color of office. The opportunity can scarcely arise for private individuals to violate either the law of nations or a treaty. Upon demurrer the complaint was sustained,¹⁷ and the court held

that officers of the United States are personally liable for torts in violation of law, although done in good faith and in supposed obedience to acts of Congress or the orders of superior officers,

thus following the unbroken course of decision from *Little v. Barreme* to *Belknap v. Schild*. An elaborate and convincing opinion was delivered by Judge Holt, who made it very clear, both upon principle and precedent, that plaintiff's franchise was property under Spanish law, that it survived the withdrawal of Spanish sovereignty, that as property it was protected by the general principles of international law and the special provisions of the Treaty of Paris against spoliation by the officers of the United States Government, and that, whatever the obligations of the government, its officers were liable for any trespass upon such property rights. An answer was then interposed, setting up as a defense the supposed ratification of General Brooke's order by the United States; in other words, pleading in effect that the order complained of had been adopted as an "Act of State," although not describing it by that particular expression. The defense was conducted by the Department of Justice of the United States, and not by any personal attorney for the defendant. The case was tried before the same judge, who sustained such defense and held that

¹⁵ 31 U. S. Stat. 897.

¹⁶ U. S. Rev. Stat., § 563, subd. 16.

¹⁷ 135 Fed. Rep. 384.

if the United States Government had originally authorized and directed Gen. Brooke to issue the order, * * * the United States Government, and *not Gen. Brooke*, would have been responsible to the plaintiff, and that subsequent ratification was equivalent to original authority.¹⁸ It does not appear how this application of the "Act of State" doctrine can be reconciled with the rule of all the former cases that the invasion of private rights by a government officer in time of peace could not be justified "even by authority of the United States."¹⁹ The court recognized that the Constitution might interfere with the spoliation of a citizen by such governmental action, but held that there could be no doubt "as to the effect of such action upon a claim held by an alien," a distinction at variance with the more liberal doctrine of such cases as *Yick Wo v. Hopkins*,²⁰ that an alien's property is no more subject to confiscation than a citizen's.

The case came before the United States Supreme Court on writ of error, and it was held, by Mr. Justice Holmes,²¹ that

it is impossible for the courts to declare an act a tort of that kind [i. e., in violation of the law of nations or of a treaty of the United States] when the Executive, Congress and the treaty-making power all have adopted the act.

This is certainly a surprising declaration and adoption of the "Act of State" doctrine, going almost to the point of holding that "the government can do no wrong" through its officers or otherwise, at any rate to an alien. So far as Executive or Congressional authorization is concerned, such a doctrine seems so clearly contrary to the whole former current of decision that it is almost inconceivable that so radical a departure could have been intended. Doubtless the supposed ratification by "the treaty-making power" was the ultimate ground of the decision. But what was this supposed ratification? It was contained in the treaty of May 22d, 1903, between the United States and Cuba, the new-born entity, not in existence as a government at the time of the treaty with Spain upon which the claimant relied. It merely provided that

¹⁸ 142 Fed. Rep. 858.

¹⁹ *Belknap v. Schild*, *supra*.

²⁰ 118 U. S. 356.

²¹ 209 U. S. 45; see this JOURNAL, Vol. 2, p. 684.

all acts of the United States in Cuba during its military occupancy thereof are ratified and validated, and all *lawful rights* acquired thereunder shall be maintained and protected.²²

It seems a strained construction of this perfectly proper general provision for the ratification of all "acts of the United States," to read into it an adoption of a specific act of a military governor, approved by an Executive Department, which was attacked on the very ground that it was not an "act of the United States," but the individual tort of the officer in question. But even if the treaty with Cuba had contained an express ratification of this particular act, why should this have any further effect than to debar Cuba and its citizens from thereafter questioning it? The claimant was a Spanish subject; the treaty between the United States and Spain guaranteed all "rights which by law belong to the peaceful possession of property of all kinds of private individuals of whatever nationality such individuals shall be," and provided that the United States, in their occupation of Cuba, should assume the obligations resulting under international law for the protection of life and property. It is hard to see how any subsequent waiver or admission by Cuba, whatever its effect on Cuban citizens, could alter or impair the obligations thus assumed by the United States towards Spain and the subjects of Spain.

Mr. Justice Holmes again referred to his decision in *Massachusetts v. Dempsey v. Chambers*, *supra*, but, as already pointed out, in that case ratification doubled the plaintiff's remedy, while in the *Brooke* case it took away the only remedy the plaintiff had.

Shorn of all disguise of legal phraseology, the act of General Brooke, in abolishing the Countess of Buena Vista's slaughter-house franchise, was an "act of war," just as much as the act of Commander Denman in burning Buron's slave barracoons, and unless it could be justified as an act of war, it was clearly a violation of international law, for which the civil redress wisely provided by the federal statutes should have been afforded. The abolition of a franchise for the purpose of transferring its revenue to a municipality scarcely seems to come within any recognized category of acts of war, especially when done in a time of complete peace, and by an

²² 33 U. S. Stat. 2249.

officer acting in a purely civil capacity, although holding military rank and styled a "Military Governor." Even the stars of a Major-General have no such magic effect.

The government contended in the litigation that General Brooke's order showed on its face "that what he was doing was organizing the institutions of the Island and its municipalities — making them *democratic and up to date*." Possibly some such idea was the underlying source of the court's decision, although unavowed and probably not fully recognized by the court itself. In the Denman case the English court presumably felt constrained to uphold the British commander as a crusader against slavery; in the Brooke case our court may in like manner have felt impelled to exonerate the American governor as an apostle of democracy.

In Mr. Bordwell's recent article in this Journal he took the view that the office of *Alguacil Mayor* had not been in terms abolished by the Spanish Government and so continued in existence under the American occupation, since it was municipal and administrative and not political; that it was the office rather than the franchise which constituted plaintiff's property, and that the new government had a right to abolish it, but could exercise this right only upon payment of compensation. This theory, however, would tend to exonerate General Brooke from individual liability, and remit the claimant to a very uncertain remedy solely against the government, since the abolition of an office is much more within the legitimate scope of governmental powers than the confiscation of a franchise or concession. Moreover, upon the pleadings and the findings of the trial court, which passed upon the legal effect of the Spanish decrees involved, the record in the Supreme Court showed that the "office," as such, ceased to exist in 1878, and only the concession or emoluments attached to it remained in existence at the time the Spanish sovereignty withdrew. Mr. Bordwell's able and interesting argument as to the distinction between administrative and political offices therefore would not have been germane to the case when it came before the Supreme Court, nor would it apparently have been helpful to the plaintiff's claim as against General Brooke at any stage of the case.

The occasions for invoking the "Act of State" doctrine will prob-

ably be few, but they will doubtless arise from time to time. In fact, within a very few years after the erection of the Cuban Government, the United States were again called upon to intervene, occupy, and restore order. Whenever such an occupation takes place, not as a hostile military invasion, but as a form of civil administration, many questions must arise as to the limitations upon the authority of the foreign officers. Is such an officer, as suggested with apparent horror by Lord Mansfield in *Mostyn v. Fabrigas*,²³ "accountable only to God, and his own conscience" — "a monstrous proposition" — or is he bound to keep within the law at his own personal peril, as held by Chief Justice Marshall? The apparent recognition by the Brooke case of the "Act of State" doctrine tends to substitute the rule of might for the rule of law, and so greatly multiplies the possibilities of international offense.

Unquestionably the task of such an officer is a hard one, and where he acts with reasonable judgment and good faith, his government should certainly protect him against personal loss. This government did so in the case of the officer who was held liable in *Little v. Barreme*, and in many other instances. But this should be done by indemnification of the officer and not spoliation of the claimant. The circuitry of such a course is more apparent than real. The government conducts the defense and Congress makes an appropriation to cover the judgment, just as it would for a judgment of the Court of Claims.

There is another possible solution of the difficulty which would really be very simple, although on account of its departure from precedent it might meet with considerable opposition. At present the jurisdiction of the Court of Claims is so limited as to exclude cases "sounding in tort." But the border line between tort and contract is somewhat vague, and the distinction, especially when implied contracts are considered, is largely artificial. It is indisputable that government officers, acting in good faith in the line of their duty, and with no motive of personal advantage, may and sometimes do trespass upon the rights of individuals. It savors of a somewhat narrow legalism to provide that, unless something in the

²³ 1 Cowp. 161.

nature of a contractual obligation can be spelled out of the transaction, the person aggrieved has no remedy against the government. Especially is this true if the "Act of State" doctrine is to be adopted in all its implications, thus taking away the remedy against the officer. The very rule that the state can not be sued except with its own consent is, in its essence, a relic of somewhat obsolescent conceptions of sovereignty.

There is no substantial difference between admitting an enforceable liability upon an implied contract, and upon a technical tort, and one claim can be as fairly and properly litigated as the other. Where a governmental act violates any fundamental law, the government should be willing to litigate the question directly and to make compensation for any private injury so occasioned.

If the jurisdiction of the Court of Claims should be so extended as to include claims by aliens and citizens alike for all injuries suffered through the official acts of government officers, all the requirements of international law in this respect would be amply fulfilled. A resort to the "Act of State" doctrine would then be an honorable assumption of governmental responsibility and not a loophole for escape from pecuniary obligation.

HOWARD THAYER KINGSBURY.

SOVEREIGNS AS DEFENDANTS

A recent decision handed down by the Supreme Judicial Court of Massachusetts, and reported in its last published report,¹ involves the broad consideration of the status of sovereigns as defendants both from the point of view of international and of municipal law. The decision concretely confirms the opinion that no matter from what point of view the theory of international law may be said to proceed, its doctrines are based on as firm principles of sound reasoning and justice as are the doctrines of the ordinary municipal law. And this notwithstanding the popular impression prevalent, especially among laymen, that international comity is the dominant principle of international law. As a matter of fact, international comity is simply a subservient and related part of the net-work of principles which make up the law of nations, principles based exclusively upon sound reasoning and justice. In the decision referred to, the plaintiff, a citizen of the United States, brought suit in the Massachusetts courts against the Intercolonial Railway of Canada by an ordinary trustee writ naming certain residents of Massachusetts as trustees. Thereupon counsel appeared as *amicus curiae* and suggested that the action be dismissed on the ground that the property known as the Intercolonial Railway was the property of the British Crown and a public work and was operated and controlled by His Britannic Majesty in the right of his government of Canada. Upon this suggestion the court dismissed the action.

In the ordinary case of a suit by a citizen of one State in the United States against a resident of another State the courts in the former State assume jurisdiction over the defendant providing property belonging to the defendant may be found within its borders. The same principle is true if the suit is against a citizen of a foreign country. But when, instead of being a citizen of a foreign govern-

¹ *Mason v. Intercolonial Railway of Canada*, 197 Mass. 349 (1908); see this JOURNAL, 3:224.

ment, the defendant is the foreign government itself, we pass beyond the confines of the municipal law and into the realm of international law. It is a main purpose of the writer to show that when such foreign government conducts an undertaking commercial in its character and not in its strict capacity as a sovereign government the law of nations should permit suit to be brought against such government providing property belonging to it may be found within the jurisdiction of the home courts. The general subject of the immunity of the sovereign power from jurisdiction of its own and foreign courts has been discussed in various decisions,² but the narrower question of immunity when engaged in undertakings private or commercial in character has never been specifically discussed, except by way of *dicta*, so far as the writer knows, unless possibly in the case referred to above determined by the Massachusetts court,³ where the bare decision on this point is given without discussion, and certain other authorities to be hereinafter considered.

In consequence of the absolute independence of every sovereign authority, and of international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, the courts decline to exercise any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to be used as such, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction.⁴

The sovereign being bound not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated for, are reserved by implication and will be extended to him. It

² *Briggs v. Light-boats*, 11 Allen (Mass.), 157; *The Constitution*, L. R., 4 P. D., 39; *Schooner Exchange v. M'Faddon*, 7 Cranch, 116; *Wadsworth v. Queen of Spain*, 17 Q. B., 171.

³ *Mason v. Intercolonial Ry.*, *supra*.

⁴ *The Parlement Belge*, L. R., 5 Prob. Div., 197 (1880); *De Haber v. Queen of Portugal*, 17 Q. B., 196.

will here be contended that to the general rule that a sovereign cannot be sued in a foreign country there are two exceptions, first, where the sovereign or state goes into the municipal courts of another country for the purpose of obtaining a remedy, then by way of defence to that proceeding, by way of counterclaim if necessary, to the extent of defeating that claim, the person sued may file a cross-bill or take other proceedings against that sovereign or state for the purpose of enabling complete justice to be done between them.⁵ The other exception is the case in which a foreign sovereign may be named as defendant for the purpose of giving him notice of the claim which the plaintiff makes to funds in the hands of a third person or trustee over whom the court has jurisdiction in which the cause of action arises from a transaction by the sovereign private or commercial in its character.

This latter exception is expressly sustained by Lawrence, J., in *Mighell v. Sultan of Jahore*,⁶ and confirmed by James, L. J., in *Strousberg v. Republic of Costa Rica*, *supra*. That the *forum rei sitæ* is not excluded by the fact that the ownership is in a foreign sovereign or ambassador is recognized in the law of England. The decisions on which the English and other courts have based the doctrine of extraterritoriality, namely, the independence of a foreign sovereign and the courtesy which induces courts to refrain from anything that would prejudice the dignity and interfere with the convenience of a foreign sovereign or his representatives, should not apply where the existence of real property gives a means of execution that does not involve any personal indignity. By parity of reasoning it has been said in the courts of England and America that proceedings *in rem*, such as the attachment of a ship belonging to a foreign sovereign and engaged in trading, for ships of war being for the public service cannot be seized, will give jurisdiction over that foreign state or foreign sovereign.⁷ A trading by a foreign sovereign will cause the exemption accorded to him in his public capacity to cease. In the case of the *United States v. Wilder*,⁸ the

⁵ James, L. J., in *Strousberg v. Republic of Costa Rica*, 14 *Law Times*, 199.

⁶ 1 Q. B., 140.

⁷ *Bar: International Law*, p. 614.

⁸ 3 *Sumner* (U. S.), 308.

question was whether property belonging to the government was liable to make contribution in a case of general average and this claim was sought to be enforced by lien. Mr. Justice Story was of the opinion that the fact that a lien was the only method of enforcing liability was the best possible reason for sustaining it. Among other things, he considered that

the distinction has often been taken by writers on public law as to the exemption of certain things from all private claims, as, for example, things devoted to sacred, religious and public purposes, things *extra commercium* and *quorum non est commercium*. That distinction might well apply to property like public ships of war held by the sovereign *jure coronae*, and not be applicable to the common property of the sovereign of a commercial character or engaged in the common business of commerce.

The public property of the sovereign is distinguished from other property belonging to state establishments in the case of the Schooner *Exchange v. M'Faddon*.⁹ Marshall, C. J., says

there is a manifest distinction between the private property of the person who happens to be a prince, and that which supports a sovereign prince and maintains the independence of a nation. A prince by acquiring property in a foreign country assumes the character of a private individual.

In the *Parlement Belge*,¹⁰ it was held that suit *in rem* could not be maintained in England against property belonging to the Belgian government on account of a collision between a steamer owned by the Belgian government and an English-owned steamer; "in the present case the ship has been mainly used for the purpose of carrying *mails* and only subserviently to that main object for the purpose of trade," showing, at least, a clear indication that if the vessel had been used mainly for the purpose of carrying passengers for hire, suit could have been maintained, for then the Belgian government would have been engaged in conducting a commercial undertaking for profit.

In the case of the *Charkieh*,¹¹ where it was sought to enforce a damage lien by proceedings *in rem*, namely, against a ship belonging

⁹ 7 Cranch (U. S.), 116.

¹⁰ Law Reports, Court of Appeals, 5 Probate Division, 197 (1878).

¹¹ L. R., 4 Ad. & Ec., 59.

to the Khedive of Egypt, Sir R. Philimore held that the Khedive was not entitled to the privileges of a sovereign. But although this ground was sufficient to dispose of the case, he delivered an elaborate judgment to the effect that where, by proceedings *in rem* against property of a foreign sovereign, the indignity of personal service of the summons or execution can be avoided, no ground for a plea of extraterritoriality exists. The object of international law, in this as in other matters, is not to work an injustice nor to prevent enforcement of a just claim, but to substitute negotiations, though they may be dilatory and the issue distant and uncertain, for the ordinary use of courts of justice in cases where such use would not lessen the dignity or embarrass the functions of the representatives of a foreign state; if the case takes a shape which avoids inconvenience, the object both of international law and of ordinary law is attained. Of the former, by respecting the personal dignity and convenience of the sovereign, and of the latter, by the administration of justice.

It seems to be disputed how far foreign sovereigns and foreign states are entitled to appear as defendants. It seems a sound view to distinguish the case where some obligation of the sovereign or the state is called in question, which depends upon an act that is competent only to the chief magistrate of the state or upon formal law, from the case where the obligation rests upon a legal relation in which any private person may be engaged and which can not be referred to in public law. In the former case, we may reject the competency of foreign courts;¹² in the latter, only allow their jurisdiction to be exercised under the same conditions as those upon which it would be founded against any private individual,¹³ without prejudice to the claims of extraterritoriality. For instance, a creditor cannot sue a foreign government on account of some loan contracted by it and resting upon a financial resolution or act; whereas, a merchant who has supplied goods to a foreign government for commercial purposes should under certain circumstances be permitted to sue in the *forum contractus*. If any foreign government desires to possess property in this country like a private person, it should

¹² Story, sec. 542A.

¹³ Vattel, vol. 2, secs. 213, 214; Gand, 12.

share the obligations incumbent upon such person. In a suit at the instance of the Brothers Mellerior, jewelers in Paris, against Queen Isabella of Spain for the price of jewelry supplied both before and after the Revolution of 1868 which drove her from the throne, the *Cour de Paris* (June 3, 1792) held that as the Queen had ordered and used the goods in a private capacity she could be sued.¹⁴ The possession of real property in England created an exception by giving scope for proceedings *in rem* in *Taylor v. Best*.¹⁵ Says Bar,

Two exceptions are indicated as existing to the general rule as to the non-liability of foreign sovereign states to be sued; the first being where the state engages in trading, the second where it is possible by attaching property and thus proceeding *in rem* to avoid the indignity and embarrassment of public service.¹⁶

It is contended that it is greatly extending the applicability of the true meaning of the maxim that "the King can do no wrong" to apply it to the case of his acting in a private or commercial capacity, when, in truth, the political power of the sovereign is not in question, but merely his civil liability in a matter of tort or contract. The constitutional signification of this maxim was in former times misrepresented. It was pretended by some that it meant that every measure of the King was lawful, a doctrine subversive of all principles of which the constitution was compounded. The prerogatives of the sovereign do not extend to do any injury because being created for the benefit of the people it can not be exercised to their prejudice, and it is, therefore, a fundamental rule that the sovereign can not sanction any act forbidden by law; it is from that point of view that he is under and not above the laws and is bound by them equally with his subjects.¹⁷

If a sovereign, as is his undoubted right, can enter into contracts he should be bound towards those with whom he contracts in the same manner and to the same extent as they are bound to him.

¹⁴ Bar: *International Law*, 614.

¹⁵ 14 C. B., 487, 522.

¹⁶ Bar: *International Law*, *supra*.

¹⁷ Chitty: *Prerogatives of the Crown*, p. 5; Broom: *Legal Maxims*, p. 53; Todd: *Parliamentary Government in British Colonies*, p. 1; Kent's *Commentaries*, pp. 479, 480.

There must be reciprocity in such cases. A contract at common law is an agreement upon sufficient consideration to do or not to do a particular thing. These elements are present when, for example, the government undertakes to work a railway as an ordinary company would. In such case it ceases to exercise its political authority and undertakes an ordinary civil transaction, and in such transaction is not above but under and subject to the ordinary rules of common law. This is the legal and logical position to hold the government to be in when it undertakes to do the business of a common carrier, without any statutory declaration to that effect, as was held by the Supreme Court of Belgium when the government of that country began to work its railroads.¹⁸ Any person making it a regular business to carry persons for hire or advantage of any kind is a common carrier between the places to and from which he is accustomed to transport persons. The owner of a stage, railroad car, shop, or ferry-boat, is, if he carries on such a business by means of such vehicles, a common carrier of persons. According to this definition it does not seem to admit of a doubt that the government operating such a railway should also be considered a common carrier of passengers.

When the political authority of a sovereign is not in question and he either personally or by his duly authorized agent enters into a contract, he should be subject to the laws relating to contracts. It may be that in consequence of the immunity attached to his person the sovereign should not be summoned before any ordinary civil tribunal of the land to fulfill the obligations of his contracts or to restore lands or chattels or to pay a just debt, in the same form of action as is a subject; the form which such an action should take is a minor matter. In all such cases, nevertheless, the maxim that the King can do no wrong must be accepted in a restricted sense, namely, subject to the constitutional right of every subject to claim from his sovereign the payment of a just debt, the fulfillment of the obligations of a contract, or the delivery of lands or chattels or damages. This right founded *ex debito justitiæ* is in reality the same as the right of action of a subject against another subject.

¹⁸ *The Queen v. McLeod*, 8 Canada Supreme Court Reports, 2 (1880).

The foregoing reasoning, however, is not confined to international law, for under similar circumstances municipal law as applied in various States in the United States has so held. Were the Commonwealth of Massachusetts, by an entity created by it or by a municipality under its authority, to build a railway to be used by such persons as pay regular fare for its use, then, at common law, and apart from statute, in case of an injury to a person through the negligence of the servants or agents of the Commonwealth or entity or municipality, as the case may be, such person may recover damages for the injury, for the rule that the Commonwealth of Massachusetts by its agents are exempt from suit does not apply when the Commonwealth or its agents conduct an undertaking commercial in its character. In the cases of cities or towns acting for the central government, the test made is whether they are acting as agents for the central government in its capacity as sovereign or in its private capacity furnishing benefits to those who pay for them, in which case the courts have invariably held that the city or town is liable for the negligence of its officers or servants in the maintenance of such property. There are many cases where the city or town has undertaken to build and maintain particular works as, for example, sewers, waterworks, and gasworks, in part for the general benefit and in part for the benefit of such individuals as may be able to use them advantageously, and where the expense is defrayed in the first instance, either wholly or partly, by assessments upon the estates immediately benefited or where a charge is made by way of toll or rent to those who avail themselves of the benefits of the work. In such cases the work is not undertaken purely as a matter of common public convenience and service for the benefit of all alike, but the city or town acts as an agency to carry on an enterprise partly commercial in its character for the purpose of furnishing conveniences and benefits to such as pay for them. The element of a consideration comes in; and in such cases it is usually held that a liability exists for an injury to an individual through negligence in building or maintaining the works.¹⁰ They should not be exempt from liability

¹⁰ *Tindley v. Salem*, 137 Mass., 171; *Childs v. Boston*, 4 Allen (Mass.), 41 at 53; *Mayor of New York v. Furze*, 3 Hill, 616; *Eastman v. Merredith*, 36 N. H., 284; *Oliver v. Worcester*, 102 Mass., 489 at 500.

to which other corporations are subject in dealing with property or rights held by them in their own advantage or emolument.²⁰

Hill v. Boston,²¹ which may be regarded as a leading case on this question, reviews all of the American and English decisions and throughout shows a distinction between a municipal corporation acting in its capacity as an agent for the central government in purely public duties and its acting in a private capacity carrying on enterprises partly commercial in its character. It proceeds: the distinction between acts done by a city in discharge of a public duty and acts done for what has been called, by way of distinction, its private advantage or emolument has been clearly pointed out by two eminent judges while sitting in the Supreme Courts of their respective States, who have since acquired a wider reputation in the Supreme Court of the Union, and by the present Chief Justice of England. Nelson, C. J., in *Bailey v. New York*; ²² Strong, J., in *Society v. Philadelphia*; ²³ Cockburn, C. J., in *Scott v. Mayor*.²⁴ Carrying out this principle concretely, the city is not liable in cases of the negligent putting out of fires by its agents or servants or in cases arising from the carrying on of educational work or in the supervision of police stations, court-houses, or jails, for in these cases it is carrying on governmental duties; whereas, on the other hand, when it deals in real estate, wharves, supplying water, supplying gas, conducts a public market, or any other business enterprise, it is acting in its so-called private capacity. In the case of the Proprietors of Mount Hope Cemetery *v. Boston*,²⁵ where the city of Boston appeared to own a cemetery and sold the lots therein, the Commonwealth afterwards created a new corporation and ordered the city to turn over the cemetery to the new corporation. It held that the law authorizing this order was unconstitutional, for the city was acting

²⁰ *Henry v. Lyme*, 5 Bingham, 91; *Nebraska v. Campbell*, 2 Black, 590; *Bigelow v. Randolph*, 14 Gray (Mass.), 543; *Merrifield v. Worcester*, 110 Mass., 216; *Murphy v. Lowell*, 123 Mass. 564 at 567.

²¹ 122 Mass., 344, 358, 359, 365, 374, 375.

²² 3 Hill, 531, 539.

²³ 31 Penn. State, 185, at 189.

²⁴ H. N., 204, at 210.

²⁵ 158 Mass., 509.

in its private capacity and its rights were similar to those of a private individual owning private property.

As was stated in introducing this article, one of its purposes was to show that international law and municipal law are fundamentally based on identical principles of right and justice. Serjeant Plowden, in *Eyston v. Studd*,²⁰ says:

Our law, like all others, consists of two parts, *viz.*, the body and soul. The letter of the law is the body of the law, and the sense and reason of it is the soul, *quid ratio legis est anima legis*. And the law may be resembled to a nut, which has a shell, and a kernel within; the letter of the law represents the shell, and the sense of it the kernel. So you will receive no benefit by the law if you rely only upon the letter.

The doctrines of international law and of municipal law are not arbitrary, but are the resultant of relative principles. While international law is largely evolutionary, and the specific proposition of liability of the sovereign in *private* acts here contended for not absolutely settled, yet its doctrines are as much determined by legitimate business habits as are those of municipal law. In such cases the more special rules of law become so extended or modified as no longer to accord with the broader principles from which they were originally deduced. Thus it seems to be with reference to the doctrine sought to be herein established, namely, the admission of liability of sovereigns in cases arising from acts done by them in their private or commercial capacity, as above. There seems to be no fundamental reason why such should not be the rule. If a sovereign government undertakes to step outside of its legitimate protection afforded by international comity and voluntarily enters the independent realm of contract for gain, it should be subject to its duties as well as to its privileges. International comity does not exist arbitrarily, but is as much a subservient principle of the law of nations as is any other. Various licenses afforded sovereigns, either expressly or impliedly, grow out of this principle. But international comity should not prevent a foreign sovereign from being named as defendant for the purpose of giving him notice of a claim which a plaintiff makes to funds in the hands of a third person or

²⁰ Plowden's Reports, 465 (1574).

trustee over whom the court has jurisdiction in cases where the cause of action did not arise from a transaction by the sovereign *extra commercium* and *quorum non est commercium*. The fact that garnishment process is the only process to reach funds belonging to a foreign sovereign is a good reason for sustaining it. In such a proceeding *in rem* the indignity of personal service of the summons or execution is avoided and the plea of extraterritoriality should not prevail. One of the objects of international law is to evoke the aid of ordinary courts, and not to work an injustice nor to prevent enforcement of a just claim, in cases where such use would not lessen the dignity or functions of a foreign state. Should a foreign government desire to possess property in a third country, there is no reason why it should not submit itself to the operation of the laws in that country. The prerogatives of the sovereign can not extend to do any injury because, being created for the benefit of the people, they should not be exercised to their prejudice. A sovereign entering into an ordinary contract, upon sufficient consideration, should be bound to the same extent and manner as is the opposite party to the contract and suit should be permitted in some form; the right being founded *ex debito justitiæ*. That this method of reasoning has been held equally applicable in municipal law to cases where a sovereign state by its agents act in an undertaking for profit has been shown by authorities cited *supra*. The element of consideration comes in, and the state or its agents act for their own advantage and emolument. It is in fact the law, as well as it is justice, to subject the doctrines of international law and of municipal law to the same processes of reasoning no matter from what theories or implications they severally proceed.

NATHAN WOLFMAN.

THE HISTORY OF THE DEPARTMENT OF STATE

V

OCCASIONAL DUTIES OF THE DEPARTMENT

Perhaps the most important of the occasional duties of the Department of State is that which involves its agency in recording the result of the quadrennial elections held in the several States for the office of President and Vice-President of the United States. Section 1 of Article II of the Constitution provided that the electors should meet in the several States, and, having voted for a President and Vice-President, should make a list of the persons voted for, which they must sign and certify to and transmit sealed to the seat of government directed to the President of the Senate. The twelfth amendment to the Constitution adopted in 1804 looked towards an improvement in the method of voting for a President and Vice-President, but did not disturb the original provision for notifying the result. There is not, therefore, any constitutional requirement for participation of the executive branch of the government in this function; but the Act of March, 1792,¹ relative to the election of a President and Vice-President provided for certain contingent duties on the part of the Secretary of State of great importance. Section 2 prescribed that the electors should meet in their respective States on the first Wednesday in December after their election, and sign three certificates of the votes given by them and seal up the same, "and send one copy by messenger to the President of the Senate; forward another to him by mail and lodge the third with the judge of the district in which the electors assembled."

Section 4 said:

That if a list of votes from any State shall not have been received at the seat of government, on the said first Wednesday in January, that then the Secretary of State shall send a special messenger to the district judge in whose custody such list shall have been lodged, who shall forthwith transmit the same to the seat of government.

¹ 1 Stat., 239.

And section 6 said:

That, in case there shall be no President of the Senate at the seat of government on the arrival of the persons intrusted with the lists of the votes of the electors, then such persons shall deliver the lists of votes in their custody into the office of the Secretary of State, to be safely kept and delivered over as soon as may be, to the President of the Senate.

This portion of the Act was confirmed by the Act of March 26, 1804,² and the only change made by the Act of January 23, 1845,³ was to change the date of meeting of the electors.

A careful search of the records of the Department of State fails to show that the electoral vote has ever been delivered to the Secretary of State. If it ever should be, his duty would be simply to act as its custodian, until the opportunity should come when it could be safely delivered to the President of the Senate.

Section 4 of the Act cited above, which became section 141 of the Revised Statutes, was amended by the Act of October 19, 1888,^{3a} to read:

Whenever a certificate of votes from any State has not been received at the seat of government on the fourth Monday of the month of January in which their meeting shall have been held, the Secretary of State shall send a special messenger to the district judge, etc.

Special messengers were occasionally sent under the original law and have been sent under that now in force, there being no difference in the method prescribed by both.

The following example of the sending of a messenger will serve as an example:

VICE-PRESIDENT'S CHAMBER

WASHINGTON, D. C., *Jan. 29, 1889.*

The Honorable

Thomas F. Bayard,

Secretary of State,

Washington, D. C.

Sir:

Referring to the provisions of an Act supplementary to the Act approved Feb. 3, 1887, entitled "an Act to fix the day for the meeting of the Electors of President and Vice-President, and to provide for and

² 2 Stat., 295.

³ 5 Stat., 721.

^{3a} 25 Stat. 613.

regulate the counting of the votes for President and Vice-President, and the decision of questions arising thereon," approved Oct. 19, 1888, I have the honor to inform you that the Certificate and List of Votes for President and Vice-President of the United States have not been received from the State of Florida.

Very respectfully yours,

JOHN J. INGALLS

*President of the Senate.*⁴

DEPARTMENT OF STATE,

WASHINGTON, D. C., *January 29, 1889.*

Henry L. Bryan, Esq.,

Messenger to the State of Florida.

Sir:—

Having been informed by the President *pro tempore* of the Senate of the United States, that the certificates and list of votes for President and Vice-President of the United States have not been received from the State of Florida, it is my duty under the Act of Congress, approved October 19, 1888, entitled "An Act Supplementary to the Act Approved February 3rd Eighteen Hundred and Eighty-Seven entitled 'An Act to fix the Day for the Meeting of the Electors of President and Vice-President and the decision of questions arising thereon'" to send a special messenger to that State to obtain from the Judge of the United States District Court in whose custody it is, by Act of Congress, required to be deposited, the certificate of the vote of that State: I therefore under Section 141 of the Revised Statutes, as amended by the above quoted Act appoint you special messenger for that purpose.

You are, therefore, instructed to proceed immediately, and by the quickest possible route, to such place as the District Judge may be found in whose custody the certificate of votes from the State of Florida has been lodged, and, there exhibiting to him this instruction, you will request that he forthwith transmit that certificate to the seat of Government, offering at the same time your services as a messenger to bring the certificate hither. You will return immediately and by the most speedy route to the seat of Government, reporting without loss of time to me at this Department and delivering the said certificate of votes to the President *pro tempore* of the Senate of the United States. You will constantly keep this Department advised by telegraph of your movements and where telegraphic despatches can reach you, in order that should any change of plan become necessary you may be informed thereof without delay.

In witness whereof I have hereunto set my hand and caused the seal of the Department of State to be affixed this 29th day of January A. D. 1889.

T. F. BAYARD.⁵

⁴ Dept. of State, Misc. Letters.

⁵ Dept. of State, Domestic Letters.

The messenger, it should be remarked, reported to the Department of State, but he delivered the electoral vote to the President of the Senate.

The Act of February 3, 1887,⁶ to fix the day for the meeting of electors of President and Vice-President, gave the Department of State specific and important duties with reference, not to the votes for President and Vice-President, but to the election of electors to choose the President and Vice-President. Section 3 said:

That it shall be the duty of the Executive of each State, as soon as practicable after the conclusion of the appointment of electors in such State, by the final ascertainment under and in pursuance of the laws of such State providing for such ascertainment, to communicate, under the seal of the State, to the Secretary of State of the United States, a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; * * * and if there shall have been any final determination in a State of a controversy or contest as provided for in section two of this act, it shall be the duty of the Executive of such State, as soon as practicable after such determination, to communicate, under the seal of the State, to the Secretary of State of the United States, a certificate of such determination, in form and manner as the same shall have been made; and the Secretary of State of the United States, as soon as practicable after the receipt at the State Department of each of the certificates hereinbefore directed to be transmitted to the Secretary of State, shall publish, in such public newspaper as he shall designate, such certificates in full; and at the first meeting of Congress thereafter he shall transmit to the two Houses of Congress copies in full of each and every such certificate so received theretofore at the State Department.

Following this requirement the Secretary of State brings the provisions of the Act to the attention of the several Governors of the States soon after the Presidential election by sending to each the following circular letter:

DEPARTMENT OF STATE,
WASHINGTON, *December —, 189—*.

Sir:

With immediate regard to the election of Presidential and Vice-Presidential electors just concluded, I have the honor to enclose herewith a copy of the Act of Congress approved February 3, 1887, relating to the

⁶ 24 Stat., 373.

duty of the Executives of the several States in certifying to the Secretary of State of the United States the appointment of such electors, and a copy of the Act supplementary thereto, approved October 19, 1888.

Respectfully requesting that I be furnished with *four* copies of the certificate required by section 3 of the accompanying Act, for the greater convenience of the Department,

I have the honor to be, Sir,

Your obedient servant,

His Excellency

The Governor of

The returns having been received are acknowledged:

DEPARTMENT OF STATE,

WASHINGTON,

, 190 .

Sir:

I have the honor to acknowledge the receipt of your certificate of the final ascertainment of the electors for President and Vice-President, appointed for the State of _____, at the election held on the 3d day of November, 190 , said certificate being under the seal of the State of _____, and dated _____, 190 .

I have the honor to be, Sir,

Your obedient servant,

His Excellency

The Governor of

They are then published in a newspaper in Washington, selected by the Secretary of State:

DEPARTMENT OF STATE,

WASHINGTON,

, 190 .

To the Washington _____

Gentlemen:

In pursuance of the provisions of the Act of Congress approved February 3, 1887, I transmit herewith for publication in your newspaper a certified copy of the final ascertainment of the electors for President and Vice-President, appointed in the State of _____, at the election held therein on the 3d day of November, 1908, as certified to me by the Governor thereof.

I am, Gentlemen,

Your obedient servant,

(For the Secretary of State)

Chief Clerk.

At the same time copies of the returns are sent to the Speaker of the House of Representatives and the President of the Senate, the same form of letter being used in each case:

DEPARTMENT OF STATE,
WASHINGTON,

, 190 .

To the Honorable Joseph G. Cannon,
Speaker of the House of Representatives.

Sir:

I have the honor to transmit herewith, in pursuance of the provisions of the Act of Congress approved February 3, 1887, and of the Act supplementary thereto, approved October 19, 1888, an authentic copy of the certificate of the final ascertainment of electors for President and Vice-President, appointed in the State of , at the election held therein on the day of November, 190 , as transmitted to me by the Governor of said State.

I have the honor to be, Sir,
Your obedient servant,

The form of certification of the copies is as follows:

UNITED STATES OF AMERICA.
DEPARTMENT OF STATE.

To all to whom these presents shall come, Greeting:

In accordance with the provisions of the Act of Congress approved February 3, 1887, I certify that the following is a true copy of the certificate of the final ascertainment of the electors for President and Vice-President, appointed in the State of . at the election held therein on the 3d day of November, 1908, as received by me from the Governor of the said State.

IN TESTIMONY WHEREOF, I,.....,
Secretary of State of the United States, have
hereunto subscribed my name and caused the
seal of the Department of State to be affixed.

DONE AT THE CITY OF WASHINGTON, this day
of, A. D. 190 , and of
the Independence of the United States of Amer-
ica the one hundred and thirty-third.

Some of the contingent duties imposed upon the Secretary of State by law with reference to the Presidential office he has never been called upon to exercise. Section 10 of the Act of March 1, 1792, provided:

That whenever the offices of President and Vice-President shall both become vacant, the Secretary of State shall forthwith cause a notification thereof to be made to the Executive of every State, and shall also cause the same to be published in, at least, one of the newspapers printed in each State, specifying that electors of the President of the United States shall be appointed or chosen, in the several States, within thirty-four days preceding the first Wednesday in December, then next ensuing.

But there must be two months interval between the date of the notification and the election.

There has never been a vacancy in the office of President through the death of both the President and Vice-President.

By the Act of January 19, 1886,⁷ the succession was vested in case of death, removal, resignation or inability of both President and Vice-President in the members of the cabinet successively, beginning with the Secretary of State, but no Secretary of State has yet been called upon to perform the duties of President.

The Act of 1792 not only provided for the succession to the Presidency, but also for the means by which one elected to that office or to the Vice-Presidency might decline to serve and by which the holder of either office might resign. In the eleventh section it said:⁸

That the only evidence of a refusal to accept or of a resignation of, the office of President or Vice-President, shall be an instrument in writing declaring the same, and subscribed by the person refusing to accept, or resigning, as the case may be, and delivered into the office of the Secretary of State.

The Act has only been invoked once — when John C. Calhoun resigned as Vice-President in 1832. He wrote Edward Livingston, the Secretary of State, the following letter (inadvertently giving the initial of his Christian name incorrectly):

COLUMBIA, S. CAROLINA,
28th Decr., 1832.

Sir,

Having concluded to accept of a seat in the Senate, to which I have been elected by the Legislature of this State, I herewith resign the office of Vice-President of the United States.

Very respectfully,
Your ob srt
J. C. CALHOUN.

Hon. H. Livingston.⁹

The Secretary of State did not acknowledge the receipt of the letter, an omission doubtless due to oversight on his part. A mere acknowledgment would have exhausted his authority and duty. He

⁷ 24 Stat., 1.

⁸ 1 Stat., 241.

⁹ Dept. of State, Misc. Letters.

could not accept or refuse the resignation, the Vice-President not being within his authority in any way. The omission to acknowledge the receipt of the resignation brought forth the following letter from Calhoun:

BROWN'S HOTEL,
4th Jan'y. 1833.

Sir,

I forwarded to your Department on the 27th Decr. from Columbia, So. Carolina my resignation of the office of Vice-President of the United States, in conformity to the provisions of the Act of Congress in such cases. I wish you to inform me by the bearer whether it has been received.

Yours respectfully,
Yours &c
J. C. CALHOUN.

Hon. Ed. Livingston.¹⁰

The acknowledgment was doubtless sent by the bearer, but it is not of record in the Department.

Not less important than the duties of the Department with reference to the Presidency are the duties which it must perform whenever an amendment is proposed to the Constitution of the United States.

The first twelve amendments were proposed on June 8, 1789, by James Madison in the House of Representatives;¹¹ the Senate concurring September 25, on which day the two houses directed that the President transmit them to the Executives of the several States, which had ratified the Constitution, and to North Carolina and Rhode Island which had not yet done so.¹² The Department of State had been established for ten days when the amendments were proposed; but the plan for their submission to the States had been completed before the Act creating the Department had been considered, so no agency of the Department was provided for. However, the second section of the organic act of the Department provided that whenever a bill, order, resolution, or vote of the Senate and House should be approved by the President, he should send it

¹⁰ Dept. of State, Misc. Letters.

¹¹ Annals of Cong., Vol. 1, p. 424.

¹² Annals of Cong., I, pp. 87, 88.

to the Secretary of State. If it was passed by the Senate and House notwithstanding the President's disapproval it should be sent to the Secretary of State by the President of the Senate or Speaker of the House.

The proposed constitutional amendments were independent of the President's approval or disapproval, but they seemed to fall within the general purpose of an Act, which was, moreover, entitled, "An Act to provide for the safe keeping of the Acts, Records and Seal, of the United States." The President, also, had already begun the practice of conducting such official correspondence as did not pertain to financial or military affairs, through the Department of State, and it naturally fell about that the proposed amendments were sent to the Governors of the States through the State Department and that the replies were sent to that Department by the President. The first ratification was that of Maryland, transmitted to the President by the Governor with the following letter:

ANNAPOLIS, *January 15th, 1790.*

Sir,

I have the honor to enclose a copy of an Act of the Legislature of Maryland, to ratify certain Articles in addition to and amendment of the Constitution of the United States of America proposed by Congress to the Legislatures of the several States.

I have the honor to be

With the highest respect, Sir,

Your most Obedt. servant,

J. E. HOWARD.

His Excellency

The President of the United States.

This letter was endorsed in the Department: .

Transmitted to this office, by order of the President of the United States, Jany. 25th 1790.¹³

Most of the ratifications appear to have been sent to the Department from the President without accompanying note; but Vermont's Act was forwarded with the following:

UNITED STATES, *January 18th, 1792.*

T. Lear has the honor to transmit to the Secretary of State, an exemplified Copy of an Act of the Legislature of Vermont (which has been

¹³ Documentary History of the Constitution, II, 330.

received by the President of the United States) ratifying the Articles of Amendment proposed by Congress to the Constitution of the United States; and also a letter which accompanied said ratification.

TOBIAS LEAR,

*Secretary to the President of the United States.*¹⁴

The President communicated to Congress the fact of ratification by a separate message for each State ratifying, the first being as follows:

UNITED STATES, *January 25, 1796.*

Gentlemen of the Senate and House of Representatives:

I have received from His Excellency, John E. Howard, Governor of the State of Maryland, an Act of the legislature of Maryland to ratify certain articles in addition to and amendment of the Constitution of the United States of America, proposed by Congress to the legislatures of the several States, and have directed my secretary to lay a copy of the same before you, together with the copy of a letter, accompanying the above Act, from his Excellency the Governor of Maryland to the President of the United States.

The originals will be deposited in the office of the Secretary of State.

G. WASHINGTON.¹⁵

This form was observed substantially in all the messages announcing ratification of these amendments.

The second proposal by Congress of an amendment to the Constitution — that of 1793 — was communicated to the Governors of the States directly by the Secretary of State, there being no law prescribing otherwise, and the ratifications or rejections were addressed to him.

Such States as failed to inform him of their action were requested to do so.

The Governor of South Carolina wrote:

Sir,

In answer to your favor respecting the proceedings of our Legislature on the recommendation of Congress relative to the suability of a State, I have the honour to inform you that our Legislature have not yet de-

¹⁴ Documentary History of the Constitution, II, 373.

¹⁵ Messages and Papers of the Presidents, I, 71.

cided on the same, but that I intend again to submit it to their consideration at their ensuing session in November.

With respect, I am, Sir,
Your most obedient
CHARLES PINCKNEY.

October 10: 1797.

To the Honourable Timothy Pickering.¹⁶ IN CHARLESTON.

On November 11, 1797, the Governor of Kentucky informed the Secretary of State of the ratification by that State, and the Secretary reported to the President that three-fourths of the States had now adopted the amendment. The President thereupon sent the report of the Secretary to Congress, January 8, 1798, with the following message:

UNITED STATES,
January 8, 1798.

Gentlemen of the Senate and Gentlemen of the House of Representatives:

I have now an opportunity of transmitting to Congress a report of the Secretary of State, with a copy of an act of the legislature of the State of Kentucky consenting to the ratification of the amendment of the Constitution of the United States proposed by Congress in their resolution of the 2d day of December, 1793, relative to the suability of States. This amendment, having been adopted by three-fourths of the several States, may now be declared to be a part of the Constitution of the United States.

JOHN ADAMS.¹⁷

This was the only formal information conveyed on the subject, but the amendment was printed in the next edition of the federal laws.

The next amendment, that proposed by Congress in 1803, was sent to the States and the ratifications received in the same manner as the amendment of 1794; but when three-fourths of the States had ratified it the Secretary of State himself, under date of September 25, 1804, sent a circular to the Governors of the several States informing them of the ratification.¹⁸

Neither the President nor he communicated the result to Congress.

The next amendment, proposed in 1809, was also sent to the States by the Secretary of State and reports of their action received

¹⁶ Documentary History of the Constitution, II, 405.

¹⁷ Messages and Papers of the Presidents, I, 260.

¹⁸ Documentary History of the Constitution, II, 451.

by him. It was not ratified by three-fourths of the States, and no information of its rejection was formally conveyed to Congress or the States.

In 1818, April 20,¹⁹ Congress gave direct legislative sanction to the agency of the Secretary of State in ascertaining the acceptance or rejection of proposed constitutional amendments by providing simply that when official notice should be received at the Department of any amendment to the Constitution having been adopted by three-fourths of the States, the Secretary of State should forthwith cause the amendment to be published, enumerating the ratifying States, in the newspapers authorized to publish the laws, and it should then become effective for all purposes; and this provision became section 205 of the Revised Statutes of the United States.

The first amendment offered after this Act was that of 1860, which followed the same course as the amendment proposed in 1809, being also rejected.

When the amendment of 1864 was submitted to the States several Governors transmitted their ratifications to the President by mistake, but they were promptly transferred by him to the Department of State. The amendment was simply published when it had been ratified by three-fourths of the States.

After the first amendment proposed in 1866 had been acted upon by the States, Secretary of State Seward issued the following proclamation:

WILLIAM H. SEWARD,

SECRETARY OF STATE OF THE UNITED STATES,

To all to whom these presents may come greeting:

Whereas the Congress of the United States on or about the sixteenth of June, in the year one thousand eight hundred and sixty-six passed a resolution which is in the words and figures following, to wit:

[Follows the joint resolution proposing the amendments.]

And whereas by the second section of the Act of Congress, approved the twentieth of April, one thousand eight hundred and eighteen, entitled "An Act to provide for the publication of the laws of the United States and for other purposes," it is made the duty of the Secretary of State.

[Follows the substance of the Act.]

And whereas neither the act just quoted from nor any other law, expressly or by conclusive implication, authorizes the Secretary of State

¹⁹ 3 Stat., 439.

to determine and decide doubtful questions as to the authenticity of the organization of State legislatures or as to the power of any State legislature to recall a previous act or resolution of ratification of any amendment proposed to the Constitution;

And whereas it appears from official documents on file in this Department that the amendment to the Constitution of the United States proposed as aforesaid has been ratified by the legislatures of [follow the names of twenty-three States];

And whereas it further appears from documents on file in this Department that the amendment to the Constitution of the United States proposed as aforesaid has also been ratified by newly constituted and newly established bodies avowing themselves to be, and acting as the legislatures of the States of Arkansas, North Carolina, Louisiana, South Carolina and Florida;

And whereas it further appears from official documents on file in this Department that the legislatures of two of the States first above mentioned, to wit, Ohio and New Jersey, have since passed resolutions withdrawing the consent of each of said States to the aforesaid amendment, and whereas it is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid and therefore ineffectual for withdrawing the consent of the said two States or of either of them to the aforesaid amendment;

And whereas, the whole number of States in the United States is thirty-seven, to wit: [follows the names of the states];

And whereas the twenty-three States first hereinbefore named, whose legislatures have ratified the said proposed amendment, and the six States next thereafter named, as having ratified the said proposed amendment by newly constituted and established legislative bodies, together constitute three-fourths of the whole number of States in the United States:

Now therefore, be it known that I, William H. Seward, Secretary of State of the United States, by virtue and in pursuance of the second section of the Act of Congress approved the twentieth of April, eighteen hundred and eighteen, hereinbefore cited, do hereby certify that, if the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed as remaining of full force and effect notwithstanding the subsequent resolutions of the legislatures of those States which purport to withdraw the consent of said States from such ratification, then the aforesaid amendment has been ratified in the manner hereinbefore mentioned and so has become valid to all intents and purposes as a part of the Constitution of the United States.

(SEAL) In testimony, &c.

Done, &c. this twentieth day of July in the year of our Lord one thousand eight hundred and sixty-eight.

WILLIAM H. SEWARD,

*Secretary of State.*²⁰

²⁰ Documentary History of the Constitution, II, 783.

For the second amendment proposed in 1866, Secretary Seward issued a proclamation July 28, 1868, setting forth the terms of the amendment and a concurrent resolution of Congress of July 21, 1868,^{20a} that the fourteenth Article had been ratified, and proceeded:

"Now, therefore, be it known that I, William H. Seward, Secretary of State of the United States, in execution of the aforesaid act and of the aforesaid concurrent resolution of the 21st of July, 1868, and in conformance thereto, do hereby direct the said proposed amendment to the Constitution of the United States to be published in the newspapers authorized to promulgate the laws of the United States, and I do hereby certify that the said proposed amendment has been adopted in the manner hereinbefore mentioned by the States specified in the said concurrent resolution, namely, the States of [naming the states], the States thus specified being more than three-fourths of the States of the United States.

And I do further certify that the said amendment has become valid to all intents and purposes as a part of the Constitution of the United States.

In testimony, &c.

The ratification of the amendment of 1868 was regularly proclaimed in a similar manner by Secretary Hamilton Fish, March 30, 1870.²¹

The amendment proposed by the 61st Congress, 1909, was sent to the Governors of the several States with the following letter:

DEPARTMENT OF STATE,
WASHINGTON.

His Excellency

The Governor of the State of _____

Sir:

I have the honor to enclose a certified copy of a Resolution of Congress, entitled "Joint Resolution Proposing an amendment to the Constitution of the United States," with the request that you cause the same to be submitted to the Legislature of your State for such action as may be had, and that a certified copy of such action be communicated to the Secretary of State, as required by Section 205, Revised Statutes of the United States.

An acknowledgment of the receipt of this communication is requested.

I have the honor to be, Sir,

Your obedient servant,

^{20a} 15 Stat. 709.

²¹ Documentary History of the Constitution, II, 893.

If this amendment, which is now pending, should be ratified by three-fourths of the States, following the precedent set in the case of the last three amendments, the Secretary of State will issue his proclamation of the ratification. If three-fourths of the States should not ratify it, it will simply fail, and no formal notification of its failure will be made.

It remains to notice as interesting among the less important occasional duties of the Department, its relation towards those universal or international exhibitions of the arts, sciences, and products of the earth which are held from time to time in this country or abroad. The degree of control exercised by the federal government over those held in this country has varied with each exhibition and has never been complete. Foreign nations are invited to participate by the Department of State, through its diplomatic and consular representatives or through foreign diplomatic representatives in the United States, the invitations being authorized by law or sent in pursuance of the general duty of the Department to foster laudable American enterprises; but the Department is not responsible for the conduct of a fair and does not prescribe regulations to govern it.

The first of the expositions held in this country was that of 1853 at New York, under the auspices of a local board of directors and without any financial or other connection with the general government beyond a general patronage; but the next was the Centennial Exhibition of 1876 for which a plan was adopted which has since maintained in a general way in other important American international fairs. It was provided in the first section of the Act of March 3, 1871,^{21a} that the exhibition should be held "under the auspices of the government of the United States," and a commission was provided for, consisting of a commissioner and an alternate from each of the States, appointed by the President upon the nomination of the several Governors of the States. The Secretary of State informed the Governors of the provisions of the Act, received the nominations, and the commissions signed by the President were countersigned by him and recorded in his Department. He invited the participation

^{21a} 16 Stat. 470.

of foreign governments in a circular note to each foreign minister in Washington:

DEPARTMENT OF STATE,
WASHINGTON, *July 5, 1873.*

Sir,

I have the honor to inclose, for the information of the Government of _____ a copy of the President's Proclamation, announcing the time and place of holding an International Exhibition of Arts, Manufactures, and Products of the Soil and Mine, proposed to be held in the year eighteen hundred and seventy-six.

The Exhibition is designed to commemorate the Declaration of Independence of the United States, on the one hundredth anniversary of that interesting and historic national event, and at the same time to present a fitting opportunity for such display of the results of Art and Industry of all nations as will serve to illustrate the great advances attained, and the successes achieved, in the interest of Progress and Civilization during the century which will have then closed.

In the law providing for the holding of the Exhibition, Congress directed that copies of the Proclamation of the President, setting forth the time of its opening and the place at which it was to be held, together with such regulations as might be adopted by the Commissioners of the Exhibition should be communicated to the Diplomatic Representatives of all nations. Copies of those regulations are herewith transmitted.

The President indulges the hope that the Government of _____ will be pleased to notice the subject and may deem it proper to bring the Exhibition and its objects to the attention of the people of that country, and thus encourage their co-operation in the proposed celebration. And he further hopes that the opportunity afforded by the Exhibition of the interchange of national sentiment and friendly intercourse between the people of both nations may result in new and still greater advantages to Science and Industry, and at the same time serve to strengthen the bonds of peace and friendship which already happily subsist between the Government and people of _____ and those of the United States.

I have the honor, &c
HAMILTON FISH,
*Secretary of State.*²²

Having invited the participation of foreigners, most of the correspondence relative to exhibiting was carried on directly between exhibitors and the Fair officials; and such complaints as were made by foreign exhibitors to their diplomatic representatives and sent to the Secretary of State were referred by him for report to the Fair

²² World's Fairs from London, 1851, to Chicago, 1893, (Norton) 41.

officials; but the final reports of the Fair were made to the Secretary of State who sent them to Congress.

The Foreign World's Fair held at Boston in 1883 was entirely in private hands, but the government by Act of June 28, 1882,²³ allowed the foreign exhibits to be admitted free of duty, a course which it has pursued towards all important fairs in this country. The Secretary of State brought the exhibition to the attention of foreign countries in the manner indicated by the following letter:

Gen. C. B. Norton,

*Secretary Foreign Exhibition,
Boston, Mass.*

[June, 1882.]

Sir:—

The members of the Massachusetts Congressional delegation have visited me asking the countenance of the government in furtherance of the proposed Exhibition of Foreign Manufacturing, Artistic and Industrial Productions, which it is proposed to hold in Boston during September, October and November of the present year. This project had already been brought to the attention of this government, and will be supported by it so far as may comport with the fact that it is local rather than a national enterprise. To this end, I have instructed the Diplomatic representatives of the United States abroad to bring the subject suitably to the notice of foreign governments, and I have also prepared a circular of instructions to our consuls directing them to give publicity to the circulars issued by your association, and to furnish intending exhibitors with all needful information. It gives me pleasure to acquaint you with this action, and to request that you send me, with as little delay as possible, 5000 copies of your descriptive circular, for distribution through the ministers and consuls.

Your obedient servant,

FREDERICK T. FRELINGHUYSEN,
*Secretary of State.*²⁴

The Act of April 25, 1890,²⁵ created the World's Columbian Commission for the World's Fair at Chicago under conditions similar to those imposed in the case of the Centennial Exposition. The Secretary of State called the commission together June 27, 1890, and thereafter acted with reference to the Fair as he had done in the case of the Centennial Exposition. The same course has been pursued towards other fairs.

²³ 22 Stat., 116.

²⁴ World's Fairs, (Norton) 52.

²⁵ 26 Stat., 62.

In the participation of the United States in foreign international exhibitions the Department is naturally the official medium, but the practice of extending congressional recognition on these occasions has varied widely.

There was no national representation of the United States at the Crystal Palace Exhibition held in London in 1851, which was the first of the great World's Fairs. Several of the States appointed commissioners and the exhibits were under State supervision,²⁶ but the fair had no official federal recognition. For the next fair held at London, that of 1862, a joint resolution of July 27, 1861,²⁷ authorized the President to take such measures as should seem to him best to facilitate a proper representation of the industrial interests of the United States, \$200,000 being appropriated for the purpose.

When the Government of France invited the United States to participate in a universal exposition to be held in 1867, Congress authorized and requested the Secretary of State by joint resolution of January 16, 1866,²⁸ to prescribe general regulations concerning the participation of the United States. It was provided that there should be a principal agent of the exposition in New York and professional and scientific commissioners, appointed by the President. The Department issued these appointments, and conducted official correspondence with the French government; but the American agent and commissioners were expected to act directly with exhibitors, and this course has been pursued with reference to subsequent foreign fairs.

The Paris Universal Exposition of 1878 furnishes an example of the course usually followed. The joint resolution of December 15, 1877,²⁹ provided for a Commissioner-General "to represent the United States in the proposed Exposition," who was to make all regulations for exhibitors under the direction of the Secretary of State, and on March 12, 1878, Secretary William M. Evarts issued official instructions approving the rules which the Commissioner had prepared, laying down the limitations of expenditures and requiring

²⁶ See Report of Benj. P. Johnson, Agent of the State of New York, appointed to attend the Exhibition of the Industry of all Nations in London, 1851.

²⁷ 12 Stat., 328.

²⁸ 14 Stat. 347.

²⁹ 20 Stat., 245.

that reports on the exhibition be made to the Secretary of State in a form fitted to transmit to Congress for publication.³⁰

For the Paris Exhibition of 1889 Secretary T. F. Bayard, in his letter of instructions to the Commissioner-General, General William B. Franklin, July 6, 1888, indicated the full extent of the Department's participation in the affairs of the exhibition.

"The Department," he said, "will address to the Governor of each State and Territory an official notification in the language of the resolution of Congress; and the heads of the several Departments will be consulted as to the possibility of official cooperation. All replies to these communications will be transmitted to you."

He was required to make monthly reports of expenses to the Department.³¹

The Department's circular letter to the Governors was as follows:

DEPARTMENT OF STATE,
WASHINGTON, *July 3, 1888.*

Sir,

By a joint resolution of Congress, approved May 10, 1888, the Government of the United States accepted the invitation of the Republic of France to take part in an exposition of works of art and the products of manufactures and agriculture of all nations, to be held in Paris, commencing the 5th day of May and closing the 31st day of October, 1889.

I have the honor to inclose herewith copies of the joint resolution referred to, and in accordance with its terms I would request you, by such methods as you may deem most suitable, to notify the people of your State to assist in the proper representation of the productions of our industry and of the national resources of our country. I would also suggest that you take such further measures as may be necessary in order to secure to your State the advantages to be derived from this beneficent undertaking.

The President, by and with the advice and consent of the Senate, has appointed General William B. Franklin as Commissioner-General to the Paris Exposition, and the office of the commission is now established at No. 35 Wall Street, New York City.

I have the honor to be, Sir,

Your obedient servant,

T. F. BAYARD.³²

³⁰ Reports of Commissioners to the Paris Universal Exposition of 1878, Vol. I, introduction.

³¹ Reports of the United States Commissioners to the Universal Exposition of 1889, I.

³² Report of Paris Com'r, i, xvii.

The last Congressional action relative to an international exposition was by Act of May 22, 1908,³³ accepting the invitation of the Japanese Government to participate in the Exposition to be held in that country in 1912 (afterwards postponed by Japan to 1917). It provided for a preliminary survey by a commission of three Commissioners-General who should act under the directions of the Secretary of State.

GAILLARD HUNT.

[The next section will deal with the subdivisions of the Department.]

³³ 35 Stat., 183.

THE CHINESE NATIONALITY LAW, 1909

The Chinese nationality law recently passed¹ is of considerable interest as illustrating the tendency of China to fall in line with modern countries in respect to law-making, and her attempt to remedy by her independent legislation a phase of the anomalous situation growing out of her seventy years' intercourse with the outer world. The law aims at two points, (1) to define the status of nationality and (2) to minimize the abuse of the lax naturalization laws of some foreign countries as applied in their colonies near China.

With regard to the first point, the law supplies a long-felt want. Before China came in contact with European countries, Chinese nationality was based upon the principles of indissoluble natural allegiance and of disability of emigration. A Chinese "was not free to go beyond the border of the seas" and when he succeeded in leaving the country he still remained a Chinese in the eyes of the law, though he had been duly naturalized in a foreign land; wherefore, if he returned to China, the authorities might or might not punish him for violating the prohibition, but in neither case was he clothed with the character of an alien so as to entitle him to the protection of his adopted country. This doctrine of perpetual allegiance, tolerable as it might have been at a time when nations were sufficient unto themselves, was incompatible with the adventurous and commercial spirit of the nineteenth century. Shortly after the Opium War, the people of the two southern provinces of China, Kwangtung and Fukien, began to emigrate in large numbers to foreign lands in quest of wealth, and not a few were naturalized there. China realized that changed conditions, coupled with her military weakness, did not warrant the pushing forward of her claims to their allegiance, and, moreover, she soon discovered the benefit derived from the emigration of her subjects; but she would not formally sanction the right of

¹ See Supplement, p. 160.

emigration, much less the right of alienage, for that would amount to the abandonment of her traditional view of perpetual allegiance, so essential to the Chinese version of the "Divine Right" theory. The Chinese Government considered the principles of allegiance as too sacred to be subject to change. All they would do was to slacken the rigidity of its operation and give provincial authorities discretion to dispose of cases in such a way as circumstances might demand. In other words, China, instead of remodelling her nationality system to meet the changed conditions of the time, simply allowed matters to drift. The result of such a state of things was that for nearly a century the Chinese nationality system was an anachronism, accompanied by serious difficulties to the government and the people. Taking advantage of the vagueness of the system, not a few unscrupulous provincial officials decided nationality cases at their own caprice and for their own benefit. In many instances they refused to recognize the acquired nationality, thus involving the country in international controversies; and in others, they considered the mere fact of emigration to be evidence of denationalization, regardless of the hardship to which individuals were thereby subjected. Where the question of inheritance was involved, a shrewd party would also not be slow to call into play all old theories of nationality that would oust the rightful owners from possession. Now, with the passage of this law all these grievances and abuses are bound to become things of the past. The law fixes the criterion of Chinese nationality in precise and definite language so that individuals can at all times know to what country they belong.

Concerning the second point, namely the mitigation of abuses of the lax naturalization laws of some foreign countries, the law takes a long step toward securing the object in view. For many decades the authorities of the European colonies near China and especially the Portuguese authorities at Macao have, partly for political and partly for pecuniary reasons, granted naturalization certificates to Chinese who have not been out of China and who simply have to allege that they were born in one of those colonies. Having secured this naturalization they continue to reside in China without disclosing their change of allegiance. They enjoy all civil and political

rights as native subjects of China, and in some cases they even hold official positions of honor and trust. It is only when they are involved in law suits, which generally arise through their own fault, or when they desire to enjoy such privileges as are secured to foreigners by treaties, that they declare their foreign citizenship. What is worse, the moment their declaration is made, they — thanks to the institution of consular jurisdiction in China — are out of reach of the Chinese court in respect both to what they have done before and to what they may hereafter do. The last fifty years are full of instances of cases abruptly dismissed, or transferred to the consular courts, simply because a consul declared that the defendants were naturalized subjects of his country. Respecting the control of these men, China has experienced great difficulty, but in spite of her efforts has failed to effect an understanding with foreign governments. It was not until the passage of this law, that an adequate means was found to grapple with this ever irritating evil. The law is purely remedial. Supplemental Provisions 1, 2, 3, 4 and 5 of the law require all persons who have in one way or another lost Chinese nationality to report the fact to the proper authorities, otherwise they will be deemed to have remained Chinese to all intents and purposes. Articles XI and XII provide certain essential conditions for the complete denationalization of subjects and refuses to recognize that of those who have not obtained authorization. Under the operation of these rules, nationality can no longer be treated as a matter of convenience, to be taken on and thrown off to meet changing circumstances, nor can it be resorted to as a dexterous means wherewith to evade obligations. Thus it is apparent that the law strikes an effective and proper blow at an abuse which has caused great annoyance to China and by whose removal, as can not be too strongly emphasized, the amity of China with the outer world will be greatly strengthened.

But important as the above reasons are, they were not the immediate causes of the enactment of the law. Nor did it owe its birth to the argument that in view of the constitutional movement it was necessary to define the status of nationality in order to determine who were the qualified voters. The immediate occasion for

the law came from without. Toward the end of 1907 the Dutch government attempted to force naturalization upon Chinese residents in Java. The Chinese Government knew that, as forced naturalization is, in the language of Oppenheim, an international delinquency, it might rely on diplomacy to prevent the execution of the Dutch scheme, but it also knew that the immediate promulgation of a nationality law was a necessity in that it would forestall the oft-repeated argument that "China has not a proper nationality code wherewith to justify her claim to the allegiance of her subjects abroad." In the beginning of 1908, consequently, the Ministry of Foreign Affairs was commanded to prepare the necessary legislation, and the present law was the outcome.

We shall now attempt to offer a few words of explanation on the more important features of the law. At the outset it may be pointed out that the law is based upon the principle of parentage pure and simple. A child takes the nationality of the father; but should this not be clearly determined, it follows that of the mother. It is only when the nationality of both parents is unascertainable that the principle of the place of birth is resorted to. Such a position is a natural one for China to take. On the one hand, she has a population which, though not so large as the present estimates indicate, is nevertheless too large to admit new additions from without, and on the other, she begins to realize as she never did before that her children born abroad will be a source of strength to her, if properly fostered and utilized. Hence, when the law was being prepared, the framers, as the Ministry of Foreign Affairs pointed out in their memorial to the Throne, had two objects in view, namely, (1) to "set up high qualifications for naturalization so that only desirable aliens should be admitted to Chinese nationality, and (2) to keep natural-born Chinese from falling under foreign dominion."

One of the most interesting features of the law is that it imposes more limitations on the political rights of naturalized subjects than the similar laws of any other country. Article VIII provides that a naturalized subject is incapable of being enrolled in the army or holding any of the higher executive or legislative positions for twenty years after naturalization; and even then only by Imperial permission. The explanation of this seemingly harsh rule is found in

China's fear of having her army and politics controlled by outsiders. She remembers bitterly the disasters she has suffered in the past at the hands of spies and consequently she is very nervous about any step that might bring her toward the same path of danger. It should also be noted that with the existence in China of consular jurisdiction, which exempts foreigners from her courts and thereby makes them a privileged class, very few persons who would become good citizens find it profitable to take Chinese nationality. Whatever liberal grant of political rights she may accord to naturalized aliens, she will not succeed in inducing many respectable persons into her nationality, but, instead, she simply opens a way to evildoers to carry out their machinations. With all this in mind, we can easily see that Article VIII is but a step of necessary precaution under existing circumstances.

That part of the law that deals with expatriation perhaps needs special explanation. Article XI says: "Any Chinese intending to acquire an alien character must first obtain a discharge;" and Article XVIII declares in unmistakable language that all persons who have become naturalized as aliens without permission from the Chinese authorities shall be deemed Chinese, regardless of circumstances. As for those persons who, prior to the operation of the law, had become naturalized, the law requires them duly to inform the local authorities of their change of character within one year after the law goes into effect, failing which they are to be deemed Chinese, if found residing in the interior or holding official positions. These several provisions taken together, are fraught with great consequences. Apart from the fact that they amount to a direct denial of the so-called inherent right of expatriation, they are inconsistent with the generally accepted principle that the acquisition of a new nationality *ipso facto* extinguishes a previous existing one; they necessarily give rise to double nationality. For instance, if a Chinese is naturalized in a country which does not trouble itself to inquire whether he has obtained dismissal from the Chinese Government, both countries will claim him as a subject, the one by reason of his naturalization and the other on the ground that he has not observed the rules of expatriation. At the present time when the troubles resulting from double nationality have been fully brought home to

the lawmakers, it is strange that the Chinese Government should create more of them by embodying in her law the state-consent clause in addition to the *jus sanguinis*, which as opposed to the *jus soli* alone affords ample material for conflicts between states. This could hardly have been due to hastiness or incomplete consideration. The law was the result of a long preparation. It was first drafted by the Ministry of Foreign Affairs conjointly with the Special Commissioner for the Codification of Laws, then revised by the Constitutional Investigation Board and finally submitted to the Grand Council for approval. Moreover, the task of drafting and revising was put into the hands of law students who were familiar with similar laws of other countries. Such being the case, how shall we then account for this state-consent clause which is now-a-days never so strongly emphasized in the law of any other country and which, as must have been foreseen, would become a source of conflicts with other nations?

The answer to this question is not far to seek. As already explained, one of the two objects of the law is to minimize the abuses of the lax naturalization laws of some foreign countries as applied to their colonies. That China has in the past suffered very greatly from these evils and must at once put a stop to them is self-evident. It only remains to be decided what steps she should take for their suppression. As she has, in spite of her repeated efforts, failed to induce the foreign governments concerned to modify their laws, it is but natural that she should turn to any means, such as the consent-clause, that may, notwithstanding all its disadvantages, give some measure of relief. To be sure, the consent-clause is too arbitrary and results in exceptional cases of hardship, but here China will plead that it is the only course open to her.

Thus we see that China is confronted with two alternatives, neither of which is wholly desirable but one of which must be taken. The alternatives are: on one hand the unchecked abuses of lax foreign naturalization laws, and on the other, the consent-clause which will necessarily give rise to double nationality. The former is a menace to the security of the country, nay, the sapping of her vitality. The latter is productive of international controversies which, however, are rare. Therefore, as a lesser evil the consent-clause is taken.

Nor need we push the interpretation of the state-consent clause too far. China does not seek to forbid the denationalization of her subjects. All that she demands is that she should be informed beforehand of the design of one of her subjects to expatriate himself and to examine whether by reason of crime, debts, or unfulfilled duties to the state, it is necessary to retain him longer. This point is fully set forth in Article XII, which says: Permission of discharge shall be granted if the petitioner is not (1) involved in any pending civil or criminal case, (2) bound to military duties, (3) in arrears with any state or communal tax, or (4) holding any governmental position or vested with official rank.

Another point that should be explained in order to avoid misunderstanding, is the attitude which the law takes towards the settlements in the treaty ports. The supplemental provisions of the law forbid under penalty of expulsion the residence in the "Interior" of all persons who have lost Chinese character. Foreign settlements in the treaty ports are not mentioned in this connection, but by a reasonable interpretation of these provisions it may be safely concluded that the Chinese Government tacitly permits such persons to reside and hold property in those places. Such a discriminating attitude is rendered necessary by the peculiar conditions existing in the treaty ports. It must not be inferred, however, that China has ceased to exercise her sovereign jurisdiction over these places, and, as a corollary, that foreign governments can naturalize her nationals in such ports as Shanghai, Canton and Tientsin. One of the established principles of international law is that a state can confer citizenship upon aliens only in virtue of its territorial sovereignty. In the case of foreign settlements in China, the sovereign jurisdiction of the Chinese Government is maintained in treaties and upheld by legal decisions. Therefore, whatever concessions China may grant to foreign settlements can in no wise destroy her sovereignty. At the most, they only serve to cast a sidelight on the limitations of China's actual jurisdiction over these places.

Enough has been said to demonstrate the importance of the law. It has been in operation for almost a year and the consensus of opinion is that it has so far worked smoothly. While an examination in detail brings out many flaws in its construction, it is nevertheless

an ingenious fabric and will remain a most important landmark in the history of Chinese law-making. It is a remarkable example of the dexterous handling which the present Chinese legislators attempt to apply to their remedial measures. If the foreign consuls in China continue to respect the law both in spirit and in letter, it will surely prove beneficial to the relations between China and the outer world.

TSAI CHUTUNG.

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EDITORIAL COMMENT

THE THIRD INTERNATIONAL CONFERENCE ON MARITIME LAW

The Third International Conference on Maritime Law met at Brussels on September 28, 1909, and adjourned October 8, to meet again next April. Germany, Argentina, Austria, Hungary, Belgium, Brazil, Chili, Cuba, Denmark, Spain, France, Great Britain, Greece, Italy, Japan, Mexico, Nicaragua, Norway, Holland, Portugal, Russia, Sweden, and the United States were the participating nations, with a total membership of sixty-two delegates. The object of the Conference was chiefly to secure uniformity of law upon four subjects: collisions, salvage, liability of ship owners, and liens; tentative conventions as to the first two, and *projects* as to the last two were adopted.¹

¹ See SUPPLEMENT to this JOURNAL, pp. 115-126.

The convention upon collisions contains eighteen articles; the first three of which make substantially no change in the present law. The fourth article is, however, the most important of this convention. Its first paragraph prescribes that in cases of mutual fault, the liability of each vessel shall be in proportion to the gravity of the fault or the degree of the negligence occasioning the collision and consequent injury; but that if this proportion can not be ascertained the liability shall be borne equally. The law of England and America, the *judicium rusticum*, now makes equal division of liability and damage, and the change effected by this article affords a flexible rule of apportionment. The admiralty rule, as harsh as it is, modifies the still harsher rule of the common law forbidding apportionment of liability and damage among joint tort-feasors. If the adjudication of an equal proportion of liability be an advance in the administration of justice, manifestly the establishment of an unequal proportion commensurate with the degree of fault is a further extension of the just principle. The old rule is based upon the impracticability of ascertaining a nicer proportion than a half liability; but it is apparent that if the court is competent to make a proportion of one to one, it can as easily make a proportion of one to two, or of one to three, or of one to four; indeed, in many cases it is less difficult to ascertain the latter. If the court is competent to fix any liability, it should, in the nature of things, be able to find the proportion of that liability. The rule of the fourth article has long been the law of the continental countries, and their courts seem to have had no difficulty in its application; and it has long been quite common for ship owners to make with ease settlements *in pais* upon a basis of unequal proportion. But the article safeguards all contingencies by providing that in the event the court can not ascertain the precise degree or proportion of fault, then the half-and-half rule shall obtain.

The residue of this interesting article deals with the rights and remedies of third persons against ships mutually at fault in a collision. Generally speaking, it provides that each ship is liable in proportion to its degree of fault, but the recovery must be "without solidarity," that is, without right of recovery of the whole damage from either vessel. For example, an injured cargo owner can recover from the non-carrying vessel only the proportional liability of that particular vessel, it not being liable for the fault of the other vessel, thus further modifying the common-law doctrine of joint and several liability among several tort-feasors, as well as changing the judicial construction of the Act of Con-

gress of 1893, known as the "Harter Act," which relieves the carrying vessel from all damage to the cargo resulting from faults or errors in navigation or management. By this act the cargo owner can only recover from the non-carrying ship; but under the decisions of our courts this ship can recover its proportion from the carrying ship. Thus, if the carrying ship is wholly at fault, it pays nothing; but, if it be partially at fault, it pays to the non-carrying vessel for the cargo owner one-half damage, which the cargo owner could not recover by direct proceedings (*The Chattahoochee*, 173 U. S. 540). This rather anomalous situation will, as suggested, be remedied by this article, which substantially squares with the law of the leading nations.

Another paragraph of this article makes an exception to the inhibition of an *in solido* recovery, with accompanying right of contribution, in all cases of personal injuries or of death resulting therefrom, and leaves to the several national legislatures the subject of contract-limitation upon the right of contribution. This special feature might profitably find comprehensive confirmation and extension by Congress in an enactment of the principles of Lord Campbell's Act, thus wisely evidencing a more tender regard for human life.

The fifth article prescribes liability in cases of collision caused by the fault of the pilot, though his employment be compulsory. This is now the American but not the English rule.

The second paragraph of the sixth article abolishes all legal presumptions of negligence or fault in fixing the responsibility for collisions. The change opens quite a field for technical discussion. It would seem that any material modification of the law or rules of presumptions is inadvisable, especially as respects the United States, for it might seriously affect some of the essential features of our admiralty administration. But a protocol could easily be devised which would fully protect our nation. It should be suggested that many nations suffer embarrassing inconveniences resulting from legal presumptions that do not apply to the United States, which inconveniences or hardships are sought to be reached by this paragraph.

The seventh article contains a prescription of two years within which suits for collisions may be brought, but suits for contribution under the fourth article must be instituted within one year. While this paragraph is not wholly satisfactory by reason of certain indefinite suspensions of the limitation, it is, nevertheless, a desirable gain in uniformity.

The remaining ten articles of this convention are mainly formal, and an explanation of them is precluded by the limits of this comment.

The nineteen articles upon salvage do not make any radical changes in the law of the United States upon this subject.

The fifth article provides remuneration, notwithstanding the salving and salvaged vessels belonging to the same owner. For example, the officers and crew of the "Mauretania" could recover for their services in salving the "Lusitania." It has been objected to this paragraph that the identity of ownership of vessels and of employment of crews would render difficult the administration of appropriate procedure; but it is doubtful if this objection has merit if the right of salvage is clearly defined; for the remuneration must come to the master and crew regardless of the sameness of the employer or owner. Upon principle the convention is manifestly just.

The second paragraph of the seventh article authorizes the court to annul and modify any salvage contract which the judge may regard as allowing remuneration excessively out of proportion to the services rendered. The provision rather reverts to the original basis of salvage, which in its genesis had no contractual source. Upon principle, there seems to be no difference between a salvage contract and any other. Fraud, duress and inequality will vitiate any contract, and if the revision applied only to cases of equitable intervention, especially to contracts made in great hurry and great danger, thereby necessarily involving inequality of negotiation, which seems provided for in the first paragraph of this article, no criticism could be made of the extension of the rule; but to give this power to a court in cases of equality of contractors, and in circumstances of deliberation, merely because the remuneration is excessive, is rather of doubtful expediency, though, of course, the convention should not be rejected for this reason.

The second paragraph of the ninth article seems to give rights to salvors of human lives intervening in cases of common danger not within the present rules. This right, however, is in the interest of humanity and is desirable.

The tenth article provides the same period of prescription in actions of salvage as in actions of collisions; and the comments heretofore made can here be considered repeated.

The remaining articles are either of formal nature or do not substantially change the existing laws upon this subject.

The *projets* upon the subject of limitation of the ship owner's liability, and maritime liens, are, as suggested, rather "studies" to be submitted to the several governments for consideration and advice. Therefore, comments upon them at this time would be premature.

It would not be improper, however, to suggest a conflict between the English rule of limitation of liability on one side, and that of the Continental nations and America on the other. Broadly speaking, the former is measured by the payment of a fixed sum per ton; while that of the latter is found in the surrender of the ship, or payment of its value.

The conference leaned to a compromise by according an option to the ship owner of adopting either rule in any given case. Manifestly, such an option is a disregard of the rights of the cargo owner. If the vessel is very badly injured or sunk, the owner is likely to surrender the ship in payment of the damage sustained; whereas, if the ship be valuable and slightly injured, the owner would exercise the option of paying a fixed sum per ton. In America, and the Continental countries, the owner practically pays nothing if the ship is destroyed; while in England he pays eight pounds per ton. Under the former rule, if the ship is slightly injured and is worth more than eight pounds per ton, the owner would pay her full value; under the latter, he would pay eight pounds. The American and Continental system seems to favor the ship owner; while that of England seems partial to the cargo owner. The option of selecting either rule manifestly favors the ship owner alone, and it seems quite impracticable to reconcile the two systems upon any just basis. One or the other, with perhaps some modification, seems the only just alternative.

THE SECOND CENTRAL AMERICAN PEACE CONFERENCE

The Central American Peace Conference of November and December, 1907, adopted a convention concerning future Central American conferences to take place from year to year. The first of these conferences was held at the City of Tegucigalpa on January 1st, 1909, and the second was inaugurated at the City of San Salvador on February 1st, 1910. The delegates to this conference were their Excellencies Señor Roberto Brenes Mesen, delegate for Costa Rica; Licenciado Manuel Maria Giron, delegate for Guatemala; Dr. Salvador Cordova, delegate for Honduras; Dr. Manuel Perez Alonzo, delegate for Nicaragua, and Dr. Salvador Rodriguez G., delegate for Salvador. The inaugural ceremony was presided over by Dr. Carlos A. Avalos, Sub-Secretary of State in the Departments of Government and Fomento, and was attended by the diplomatic and consular corps and the high state officials.

After an address of welcome, Dr. Salvador Rodriguez G. and Señor Roberto Brenes Mesen were elected respectively President and Secretary of the Conference.

Beside the opening and the closing session, seven regular meetings of the Conference were held, which adjourned on February 5, 1910. The conference adopted, in all, six conventions:—

1. A convention relative to the unification of the monetary standard in the Central American Republics upon a gold basis.

2. A convention relative to the approval of plans and expenses and the manner of payment for the construction and equipment of the Central American Pedagogical Institute.

3. A convention relative to the declaration of the duties of the International Central American Bureau.

4. A convention relative to the unification of weights and measures.

5. A convention relative to Central American commerce, and,

6. A convention relative to the consular service of the Central American Republics.

The conventions are printed in the Supplement to this number of the JOURNAL, p. 170.

THE BELGIAN LAW ON THE ACQUISITION AND LOSS OF NATIONALITY

The advent of a new law defining more closely the national status of an individual has more than local interest; for, though citizenship is a municipal relation determined by national law, the protection of a person abroad by a state may give rise to an international question which it has become the custom of nations to solve in the first instance generally, though not necessarily, by determining the citizenship of the individual.

One of the last acts of the late King Leopold during the past summer was to sign the Belgian Law on Nationality, which is reprinted in the Supplement, p. 167. It is of historical interest, in this connection, to note that this law repeals and replaces several sections of the Civil Code granted by Napoleon when Belgium was a part of the Empire. The remainder of the Belgian law on citizenship is to be found mainly in certain articles of the Constitution of February 7, 1831, and in the law of August 6, 1881, concerning naturalization.

The method of naturalization outlined in the latter law is briefly this. The alien signs a written application, which is referred to Parliament.

If both Chambers vote favorably and the vote receives the royal sanction, the Minister of Justice delivers to the applicant a certified copy of the act of naturalization. Thereupon the applicant must within two months declare before the mayor of his place of residence that he accepts the naturalization thus conferred upon him. Finally, the act of naturalization is published in the Official Gazette.

With naturalization in this sense the new law has little to do, save to say that "A foreigner who has obtained Belgian naturalization becomes Belgian." In fact, the recent law is composed chiefly of rules for the determination of the nationality of minors and married women. Out of the eighteen articles, two of which are "Transitory Provisions" and a third a repealing clause, thirteen articles deal more or less with the nationality of children. The status of this embryo citizen is fixed from the moment of conception (Article 3) up to and including years of discretion. Not only the unborn child but the natural born, the foundling and the post-marital child are provided for.

The doctrine of election is recognized and adopted both in the case of children of foreigners who acquire Belgian nationality and of children of Belgians who lose their allegiance. The twenty-second year is the period during which, generally, the election must be declared in writing before the proper authorities or officials, but upon reaching the age of eighteen the minor may, with the consent of a parent or other of his forefathers, acquire the high privileges of Belgian nationality. The Belgian law thus follows the generality of Continental codes which provide for election at majority. In America, however, the reverse is the situation. Until a recent act of Congress, it is doubtful if any statute ever confirmed the doctrine, though there appears to be a well established doctrine of election which the courts have recognized.

Subject to election at majority, the minor unmarried children of a foreigner in general acquire Belgian nationality with their parents. Whether in order to do so the children must go to Belgium to reside, is not expressly stated and it would seem, remains an open question. In the United States a child in such a case is not deemed a citizen until he "begins to reside permanently in the United States."

Next to children, the nationality of married women is most largely considered in the Belgian statute. In general, the national character of a wife is that of her husband, whether she is a foreign or a Belgian woman. In the latter case she may recover her nationality provided she has retained or effectively renewed her domicile in Belgium. In this

connection, it may be observed that the act of Congress of March 2, 1907, on this subject is very similar.

Under the old Belgian law, nationality was lost by "naturalization" abroad or by settling in a foreign country without intention of returning, that is, by acquiring a domicile there. The presumption, however, was against the giving up of the intention. By the new law, however, the loss of nationality by acquiring a domicile abroad is omitted altogether, while the loss of the nationality of children by change of nationality of parents is added.

The recovery of lost nationality is made in general simply by properly and effectively establishing a domicile in Belgium. This includes Belgian women after the dissolution of a foreign marriage, and children who have the right of an election at twenty-one.

The nationality law of Belgium is a good example of the application of the doctrine of *jus sanguinis* to citizenship. But one instance is noted where birth alone on Belgian soil supports citizenship and this only where a child is born of parents "legally unknown or without fixed nationality." Even birth in Belgium of foreign parents must be followed by domicile there. But, roughly speaking, birth of parents of whom at least one is or was a Belgian is a prerequisite to Belgian nationality. This is common in civil law countries where the jurisdiction follows the person, while in common law countries where jurisdiction is territorial *jus soli* is the rule. Both rules, however, have been greatly modified and more or less blended by statute.

If, as stated, citizenship is a municipal status to be determined solely by local laws, it is evident that cases may arise where two or more countries claim the citizenship of the same person. Such a person would logically owe double allegiance, but practically he would be a citizen of that one of the interested countries in which he is for the time residing. The difficulty comes when he enters an uninterested country which must then decide the conflict of laws. The Belgian law, however, by convenient provisos, overcomes to a degree this inconvenience. Thus children born abroad of parents of Belgian origin are Belgian "if the father has no fixed nationality;" also a post-marital child is Belgian "if the mother enjoys Belgian nationality at the time of the child's birth," etc.

This law affords a good example of the consistent and it would seem proper use of the words "domicile" and "residence." "Domicile" is a technical legal term which appears to have a well settled meaning. To

constitute domicile, there would generally seem to be required, among other things, coincidence of intention to make a home at a certain place and physical presence in that place; whereas "residence," if the conflicting decisions of the courts can be reconciled, means physical presence chiefly, the intention playing little or no part. In the Belgian law the word "residence" appears but once and then in its appropriate garb, while "domicile" is properly used in a dozen places. This should be compared with the recent American laws on nationality, in which the word "residence" is almost exclusively used, though apparently at times in the sense of "domicile."

THE FOURTH INTERNATIONAL AMERICAN CONFERENCE

The Fourth International American Conference, which will be held at Buenos Aires in July of this year, will be one of the most important gatherings of its kind which has ever been held upon the Western Hemisphere. That its importance is generally recognized is evidenced by the character of the men whom the different American governments are appointing as delegates. The very best men in the public, professional and business life of these nations will make up the Conference, and should reach conclusions which will be of benefit to all America. The United States delegation is headed by Honorable Henry White, who has served twenty-seven years in the diplomatic service and held as his last position the ambassadorship to France. The other members are Colonel E. H. Crowder of the United States Army, who has distinguished himself in the legal constructive work of the Philippines and Cuba; Lewis Nixon, who is one of the leading business men of New York and who has also made a close study of international relations; John Bassett Moore, who is one of the best known authorities on arbitration and has written many books on international law; Dr. Bernard Moses, who was a member of the Philippine Commission when President Taft was Chairman of it and who has been long associated with the University of California; Dr. Paul Samuel Reinsch, who was a delegate of the United States to the last Pan-American Conference in Rio de Janeiro and to the Pan-American Scientific Congress in Santiago; Lamar Charles Quintero, who is one of the principal lawyers of New Orleans, and David Kinley, dean of the faculty of the University of Illinois.

Many important subjects will come before the Conference for consideration and action, as will be shown by the full programme which follows:

Programme of the Fourth International Conference of the American Republics to be held at Buenos Aires, Argentine Republic, July 9, 1910.

- I. The organization of the Conference.
- II. Commemoration of the Argentine National Centenary and of the Independence of the American Republics as suggested by the fact that many of those nations celebrate their national centenaries in 1910 and neighboring years.
- III. Submission and consideration of the reports of each delegation as to the action of their respective governments upon the Resolutions and Conventions of the Third Conference held at Rio de Janeiro in July, 1906, including a report upon the results accomplished by the Pan-American Committees and the consideration of the extension of their functions.
- IV. Submission and consideration of the report of the Director of the International Bureau of the American Republics, together with consideration of the present organization and of recommendations for the possible extension and improvement of its efficiency.
- V. Resolution expressing appreciation to Mr. Andrew Carnegie of his generous gift for the construction of the new building of the American Republics in Washington.
- VI. Report on the progress which has been made on the Pan-American Railway since the Rio Conference, and consideration of the possibility of cooperative action among the American Republics to secure the completion of the system.
- VII. Consideration of the conditions under which the establishment of more rapid mail, passenger and express steamship service between the American Republics can be secured.
- VIII. Consideration of measures which will lead to uniformity among the American Republics in consular documents and the technical requirements of customs regulations, and also in census and commercial statistics.
- IX. Consideration of the recommendations of the Pan-American Sanitary Congresses in regard to Sanitary Police and quarantine and of such additional recommendations as may tend to the elimination of preventable diseases.
- X. Consideration of a practicable arrangement between the American Republics covering patents, trade-marks and copyrights.

- XI. Consideration of the continuance of the treaties on Pecuniary Claims after their expiration.
- XII. Consideration of a plan to promote the interchange of professors and students among the universities and academies of the American Republics.
- XIII. Resolution in appreciation of the Pan-American Scientific Congress held in Santiago, Chile, 1909.
- XIV. Resolution instructing the Governing Board of the International Bureau of the American Republics to consider and recommend the manner in which the American Republics may see fit to celebrate the opening of the Panama Canal.
- XV. Future Conferences.

BAIL IN EXTRADITION CASES

The recent case of *In re Mitchell*, decided by the District Court for the Southern District of New York, June 30, 1909 (see Judicial Decisions, this JOURNAL, p. 484), involved the increasingly recurring question of the right of our courts to grant bail in extradition cases. In this case the District Judge, on the authority of *Wright v. Henkel*, 190 U. S. 40 (see this JOURNAL, Vol. 1, p. 202), granted bail to a defendant held under extradition process initiated by the Government of Great Britain upon what seems to have been a charge of larceny committed within the Dominion of Canada. The judge justified his action in granting bail in this particular case on the ground that

It seems to me that the hardship here upon the imprisoned person is so great as to make peremptory some kind of enlargement at the present time, for the purpose only of free consultation in the conduct of the civil suit upon which his whole fortune depends. Those special circumstances alone move me to allow him to bail, and his enlargement is to be limited strictly to the period of that suit. As soon as that is terminated he must be returned to the Tombs prison to await the determination of the commissioner upon the extradition proceedings. * * * I am also moved to this disposition from the fact that he has long known of these proposed proceedings and has made no effort to avoid them or to escape.

Waiving for the moment the question as to whether or not the interpretation placed by the court upon *Wright v. Henkel* is correct, it should be observed that in granting bail to the fugitive the court does not appear to have taken into consideration or at least to have been controlled by any of the ordinary questions usually considered in granting bail in criminal cases. For example it seems to be quite well established

that in matters of criminal jurisdiction, the granting of bail depends, in a large measure, upon the question of the probable guilt or innocence of the person accused, the courts having, however, liberally construed the rule regarding the conclusiveness which must in such cases be shown upon the question of guilt. The courts also carefully consider in addition to this question of the conclusiveness of the guilt of the accused, further questions regarding the nature of the offense and the punishment which is likely to be imposed, as these will be determinative factors in forecasting the probable appearance of the accused at the trial should he be admitted to bail. Moreover on the side of the accused, the courts, upon appropriate occasions take into consideration the question of the physical condition of the accused and the probable effect upon him of the confinement necessary to imprisonment. Therefore granting that fugitives from justice are entitled to bail in international extradition proceedings, it would seem that the release of a prisoner held under extradition procedure should be controlled by similar proceedings to those which govern matters of bail in ordinary criminal proceedings, with perhaps this apparent modification in the matter of the conclusiveness which must be shown, namely, that since in order to obtain extradition it is not necessary for the demanding government to prove the actual guilt of the accused but only to make out a *prima facie* case against him in order to be entitled to his surrender, it would seem that the *prima facie* case being made, that degree of conclusiveness has been established in those proceedings which should preclude the granting of bail under the general rules governing bail in criminal cases. Therefore, to grant bail, as in this case, merely because detention works a hardship upon the fugitive in the matter of a civil suit seems a somewhat extraordinary procedure, even considering that extradition cases areailable, and appears to make a precedent which may well hamper extradition proceedings, and indeed if followed generally will doubtless result in defeating the very purpose of extradition treaties. It will be a poor counsel who can not make out a case of hardship because of the imprisonment of the accused.

It is believed, however, that, notwithstanding this case, the weight of authority is against the granting of bail in extradition cases, and that a fair interpretation of the decision of the Supreme Court of the United States in *Wright v. Henkel* scarcely leads to the conclusion reached by District Judge Hand in the case under discussion.

The federal statutes under which the judicial officers operate in grant-

ing bail to fugitives, so far as they affect matters of international extradition, read as follows:

Sec. 1014. For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

Sec. 1015. Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section to arrest and imprison offenders.

Sec. 1016. Bail may be admitted upon all arrests in criminal cases where the punishment may be death; but in such cases it shall be taken only by the Supreme Court or a circuit court, or by a justice of the Supreme Court, a circuit judge, or a judge of a district court, who shall exercise their discretion therein, having regard to the nature and circumstance of the offense, and of the evidence, and to the usages of law.

It will be noted that under these statutes the question of granting bail is for determination "by any justice or judge of the United States, or by any commissioner of a Circuit Court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State" (R. S., § 1014); that by section 1016 it is provided that "upon all arrests in criminal cases where the punishment may be death" bail "shall be taken only by the Supreme Court or a Circuit Court, or by a justice of the Supreme Court, a circuit judge, or a judge of a District Court, who shall exercise their discretion therein;" and that by section 1015 it is provided that "bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section to arrest and imprison offenders."

It will be observed from the provisions of these statutes that, at least so far as the persons who may grant bail are concerned, the statute specifically provides the only persons who have the right to grant bail in criminal matters ; that therefore the right of an individual in a given case to grant bail must be derived from the statute; and it would seem to follow that if the right to grant bail is not specifically given to a particular individual, such individual may not extend bail. This seems clear from the wording of the statute.

Will the same rule hold as to the cases in which bail may be granted? Some of our courts have answered this question in the affirmative. In *In re Carrier*, 1893, 57 Federal Reporter, 578, where the fugitive, who was accused of larceny in the Dominion of Canada (a case on all fours with the present), sought to secure bail, the court said:

It is not a question whether larceny is a crime bailable at common law, or by our law, or by the law of Canada. The proceeding stands upon the statute only, and it is believed that no departure can be made from the statute in any substantial manner. It is said that in matters not mentioned in the statute the practice should be according to the course of our law. The matter of admitting to bail is not a question of practice. Since the time of Edward I. it has been regulated by statute; and, in our day, bail is not allowed in any case except in pursuance of some statute.

Ten years later, in the case of *In re Wright*, 1903, 123 Federal Reporter, 463, 464, the court, in passing upon the right of bail in extradition cases, said:

4. The opinion of Lord Russell in *Queen v. Spillsbury*, 2 Q. B. D. (1898) 615, upon which petitioner principally relies, and which holds that "the Court of Queen's Bench has, independently of statute, by the common law, jurisdiction to admit to bail," is not persuasive. The opinion concludes with the statement: "This inherent power to admit to bail is historical, and has long been exercised by this court, and, if the Legislature had meant to curtail or circumscribe this well-known power, their intention would have been carried out by express enactment." The Circuit Courts of the United States, however, have no such historical heritage. "These courts are creatures of statute, and they have only so much of the judicial power of the United States as the acts of Congress have conferred upon them." *Bath County v. Amy*, 13 Wall. 244, 20 L. Ed. 539.

The Supreme Court did not, however, fully endorse these views, and Mr. Chief Justice Fuller limited the doctrine, thus laid down by Judge Lacombe, as follows:

We are unwilling to hold that the Circuit Courts possess no power in respect of admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts

may not in any case, and whatever the special circumstances, extend that relief. Nor are we called upon to do so as we are clearly of opinion, on this record, that no error was committed in refusing to admit to bail, and that, although the refusal was put on the ground of want of power, the final order ought not to be disturbed. [*Wright v. Henkel*, 1903, 190 U. S. 40, 63; cited and approved: *In re Ah Tai*, (1903) 125 Federal Reporter 795, 797; *In re Sum Poy*, (1904) 128 Federal Reporter 974, 975; *United States v. Fah Chung*, (1904) 132 Federal Reporter 109, 112.]

While in the principal case Judge Hand did not quote the exact language of *Wright v. Henkel* upon which he relied, he doubtless had in mind this expression of the court, the only one indeed in the opinion that suggests a basis for his opinion, and in this connection we may be permitted the following observations:

1. In the first place, this declaration of the learned chief justice may be fairly regarded as *obiter*, since, as a matter of fact, the court refused to disturb the ruling of the lower court declining to grant bail in this case.

2. The declaration is not an affirmative statement that bail is grantable in extradition cases, but is a statement that the Supreme Court is unwilling to hold that it is not grantable in extradition cases, which is followed, in the same breath, by the statement that they do not hold so and that they are not called upon so to do.

It is difficult therefore to see in this declaration any justification for the broad and unqualified ground taken by the court in the principal case.

Mr. Chief Justice Fuller did, however, make an affirmative statement upon the question already referred to above as to whether or not the statutes of the United States authorized the granting of bail in extradition cases, and upon this point he reached a negative conclusion. In the course of his opinion he said:

By section 1015 of the Revised Statutes it is provided: "Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section to arrest and imprison offenders." But this must be read with section 1014, the preceding section, and that is confined to crimes or offenses against the United States. *Rice v. Ames*, 180 U. S. 371, 377. These sections were originally contained in one section. Judiciary Act of 1789, 1 Stat., p. 91, c 20, § 33.

Not only is there no statute providing for admission to bail in cases of foreign extradition, but section 5270 of the Revised Statutes is inconsistent with its allowance, after committal for it is there provided that if he finds the evidence sufficient, the commissioner or judge "shall issue his warrant for the commitment of

the person so charged to the proper jail, there to remain until such surrender shall be made."

And section 5273 provides that when a person is committed "to remain until delivered up in pursuance of a requisition," and is not delivered up within two months, he may be discharged, if sufficient cause to the contrary is not shown.

The demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligations to make the surrender; an obligation which it might be impossible to fulfill if release on bail were permitted. The enforcement of the bond, if forfeited, would hardly meet the international demand; and the regaining of the custody of the accused obviously would be surrounded with serious embarrassment. And the same reasons which induced the language used in the statute would seem generally applicable to release pending examination. [U. S. 190, 61-62.]

In the earlier case of *Rice v. Ames*, which the Chief Justice cited and relied upon, Mr. Justice Brown commented upon the same point as follows:

Provision is made by Rev. Stat. sec. 627 for the appointment of commissioners of the Circuit Court, now called United States commissioners, act May 28, 1896, c. 252, sec. 19, 29 Stat. 140, 184, who shall exercise such powers as may be conferred upon them. By Rev. Stat., sec. 727, they are vested with such authority "to hold to security of the peace and for good behavior in cases arising under the Constitution and laws of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective States, in cases cognizable before them." This evidently defines the extent of their powers and not the mode in which such powers are to be exercised. By section 1014, they are vested with the power to arrest, imprison or bail offenders "for any crime or offense against the United States" "agreeable to the usual mode of process against offenders in such State," that is, the State wherein the offender "may be found." That this has no application to continuances before commissioners in extradition proceedings is evident, first, by the fact that the section is confined to crimes or offenses against the United States, and, second, because it refers only to the usual mode of *process* against offenders in such State, and not to the incidents of the examination. To hold that the commissioner is confined in the matter of continuances to the methods prescribed for justices of the peace and other magistrates of the particular State would be utterly destructive of his power in cases arising beyond the seas, where weeks might be required to obtain the attendance of witnesses, or the procurement of properly authenticated depositions for use upon the examination. Clearly there is nothing either in the treaty or the statutes requiring commissioners to conform to the State practice in that regard. The only requirement seems to be that arising from the tenth section of the Ashburton Treaty, that the fugitive shall only be surrendered "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged, shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed. [180 U. S. 377, 378.]

In connection with both these cases, it should be observed that in *In re Wright*, 123 Federal Reporter, 463-464 (already cited and quoted from above), Circuit Judge Lacombe made the following observations upon the question of the application for bail:

The application to admit to bail is denied, briefly, for the following reasons:

1. The only case found in our Reports which deals with the subject of bail in international extradition proceedings is adverse to petitioner. *In re Carrier*, (D. C.) 57 Fed. 578.

2. Applications to admit to bail in such cases have on several occasions (although not recently) been made to the Circuit Court in this district, and have been uniformly denied, although no opinions appear to have been written.

3. It is not difficult to conceive of some sufficient reason why the United States, having assumed certain treaty obligations, should provide a scheme for carrying them out which should not provide for enlargement on bail; and we find that, whereas the statutes regulating the arrest of persons in one federal district who may be charged with crime in another district provide for taking bail, the statute regulating international extradition makes no such provision.

It may be, as stated by Judge Hand, that bail is not infrequently granted in extradition cases within his district, but it would seem that such cases are not reported, and it is therefore impossible to consider the reasons which may have induced the granting of bail in the particular instances to which he refers.

The only other reported cases which we have noted in which the right of bail was extended to a fugitive sought under extradition proceedings is equally unsatisfactory with the present case in the matter of the reasoning and grounds upon which the court based its action. In this other case the Supreme Court of Arizona indicated its readiness to grant bail in an extradition case in the following language:

The petitioner will be discharged from custody, unless the authorities prosecuting the proceedings desire to take appeal to the Supreme Court of the United States, in which case, the petitioner will be remanded to the custody of the marshal to be released upon his giving bail in the sum of \$25,000, under the provisions of Rule 34 of the Supreme Court of the United States. [*Ex parte Ramirez*, 90 Pacific Reporter, 323.]

The rule invoked by the Supreme Court of Arizona in this case reads as follows:

Custody of Prisoners on Habeas Corpus.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

In the course of its opinion the court dwelt upon two points: first, that the writ of *habeas corpus* could not perform the office of a writ of error; and, secondly, that the evidence submitted before the committing magistrate was not legal evidence upon which it was proper to hold the accused. No question seems to have been raised regarding the right of the federal court to grant bail in extradition cases; the statutes were not cited or discussed; the cases governing this point were not mentioned; and, indeed, the whole question of the right of the court to grant bail in extradition cases seems to have been accepted as a matter of course without argument. It is believed, therefore, that little reliance can in the final determination of this question be placed upon the holding of the court in this particular case.

In the face of the fact that the statement in *Wright v. Henkel*, upon which the court in the principal case must have relied when he stated that "my understanding of *Wright v. Henkel*, 190 U. S. 40, 23 Sup. Ct. 781, 47 L. Ed. 948, is that the existence of the power was distinctly affirmed by the Supreme Court," is *obiter* and that, as a matter of fact, bail was refused in *Wright v. Henkel*; and in view of the precedents as above set forth, in which bail was not only distinctly refused in the cases, but the authority to grant bail at all in extradition cases was also denied, it is not believed that the decision in the present case can be regarded as entirely well considered if indeed sound.

Moreover there is still left as a guide to the question of bail in extradition cases that fundamental principle set forth so succinctly by Mr. Chief Justice Fuller in *Wright v. Henkel* (the very case relied upon by Judge Hand) when he said:

The demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender; an obligation which it might be impossible to fulfill if release on bail were permitted. The enforcement of the bond, if forfeited, would hardly meet

the international demand; and, the regaining of the custody of the accused obviously would be surrounded with serious embarrassment. And the same reasons which induced the language used in the statute [R. S. 5270-5273, which the Chief Justice had already quoted] would seem generally applicable to release pending examination.

It is believed that in these few words the learned Chief Justice has laid down the basic principle that must ultimately govern and determine the question of bail in international extradition cases; and that principle will forbid, certainly as a general rule, and save in the most exceptional cases, the granting of bail to fugitives from the justice of a foreign government.

THE JURISDICTION OF THE RIO DE LA PLATA

The protocol between the Republics of Argentine and Uruguay dealing with the troublesome question as to the jurisdiction over the River de la Plata, which is printed in full in the Supplement to this number of the JOURNAL, p. 138, closes another interesting chapter in the history of the negotiations with regard to this important international dispute. For a brief account of the questions in dispute and the respective contentions of the two Governments, reference may be made to the editorial comment of the JOURNAL for October, 1907, Vol. I, Pt. 2, pp. 984-988. It is sufficient to recall that the Government of the Argentine, basing itself upon historical arguments and arguments of a practical nature, maintains that its jurisdiction extends over the entire Rio de la Plata, excepting a restricted zone along the Uruguayan shore; whereas, the Government of Uruguay declines to admit the force of the historical and practical arguments advanced by the Government of Argentine and, basing itself upon the general principles of international law, maintains its right to divide with the Government of Argentine the jurisdiction over the river.

The choice of the plenipotentiaries who negotiated and signed the protocol which has so happily allayed the growing irritation between the two Governments marks the importance attached to the negotiations by both Governments. The protocol was negotiated and signed on behalf of the Argentine by Dr. Roque Saenz Peña, Argentine Minister to Italy and at present prominently mentioned as the next president of the Argentine, who proceeded to Montevideo on a special mission for the purpose, and on behalf of Uruguay by Dr. Gonzalo Ramirez, Uruguayan Minister to the Argentine, who was recalled from Buenos Aires in order

to enable him to sign the protocol. It will be recalled that Dr. Saenz Peña was the head of the Argentine delegation to the Hague Conference and was selected by the Government of Venezuela from among the members of the Hague court to act as arbitrator in the approaching arbitration between the United States and Venezuela, but was compelled to withdraw as arbitrator on account of his other duties.

The text of the protocol itself may seem somewhat disappointing to those who are not acquainted with the history of the negotiations which led up to its signature on account of its failure to provide a definitive solution for the questions at issue. However, the third article provides for the maintenance of the status quo by stipulating that "the navigation and use of the waters of the River Plate will continue without alteration as up to the present," while the other articles of the protocol contain mutual engagements to approach the future solution of the questions involved in a spirit of friendship and amity and thus point the way to an ultimate adjustment at some time when the subject may be dispassionately considered, divorced from any incidents which may have made for friction in the recent negotiations.

Those who are best acquainted with the situation and therefore best qualified to judge, appear to regard the agreement, which seems to have been hailed with equal satisfaction by the public opinion in both countries, as most wise both in its inclusions and omissions and of the highest importance in bringing about the ultimate amicable solution of this question which has so long vexed the relations of two friendly nations.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Arch. dipl.*, Archives diplomatiques, Paris; *B.*, boletín, bulletin, bollettino; *B. A. R.*, Monthly bulletin of the International Bureau of American Republics, Washington; *Doc. dipl.*, France: Documents diplomatiques; *Dr.*, droit, diritto, derecho; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Gd.*, Great Britain: Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *Mém. dipl.*, Mémorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *N. R. G.*, Nouveau recueil général de traités, Leipzig; *Q. dipl.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs-G.*, Reichs-Gesetzblatt, Berlin; *Staatsb.*, Staatsblad, Gröningen; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, the Times (London); *Treaty ser.*, Great Britain: Treaty Series.

October, 1909.

- 2 CHINA—GREAT BRITAIN—UNITED STATES. Agreement signed for the construction of the Chinchow-Tsitsihar-Aigun Railway, by a British firm with American capital. *North China Herald*, January 28.
- 6 COLOMBIA—FRANCE. Ratifications of the Arbitration convention signed at Bogota, December 16, 1908, exchanged at Bogota. *Text in R. Generale de Dr. Int. Public*, 16: (725) 41.

November, 1909.

- 3 INTERNATIONAL MOROCCO MINES COMMISSION met at Paris. The Commission is a technical one appointed under the Algeciras Act. *Times*, November 4.
- 3-12 GREAT BRITAIN—SWITZERLAND. Exchange of notes renewing for a further period of five years the arbitration convention, signed at London, November 16, 1904. *Treaty ser.*, 1909, No. 33. *R. Generale de Dr. Int. Public*, 16:682.
- 5 FRANCE—PORTUGAL. Exchange of ratifications at Lisbon, of convention signed at Lisbon, July 11, 1908, to facilitate telegraphic relations between the French and Portuguese Congos. *J. O.*, December 8.

November, 1909.

- 5 BRAZIL—PERU. Arbitration Treaty for the settlement of international questions concluded at Rio de Janeiro. *B. A. R.*, January, 1910.
- 5 FRANCE—SWEDEN. Publication in *J. O.* of exchange of notes at Paris regarding the intention to renew the arbitration convention of July 9, 1904, for a further period of five years. *R. Generale de Dr. Int. Public*, 16:682; *text in ditto*, 12:151.
- 6 BRAZIL—URUGUAY. Treaty signed modifying the frontiers along the Jaguarao River and Lake Merim to the advantage of Uruguay. *Q. dipl.*, 13:635; *B. A. R.*, January and February.
- 8 FRANCE—NORWAY. Publication in *J. O.* of exchange of notes at Paris regarding the intention to renew the arbitration convention of July 9, 1904, for a further period of five years. *R. Generale de Dr. Int. Public*, 16:682; *text in ditto*, 12:151.
- 9 GREAT BRITAIN—SWEDEN. Convention renewing for a further period of five years the Arbitration Convention of August 11, 1904, signed at London. *Treaty ser.*, 1909, No. 31.
- 9 GREAT BRITAIN—NORWAY. Convention renewing for a further period of five years the Arbitration Convention of August 11, 1904, signed at London. *Treaty ser.*, 1909, No. 27.
- 9-22 GREECE—RUSSIA. Trademark declaration signed at Athens, giving to subjects of each in territories of the other, most-favored-nation treatment in the matter of trademarks. *Official Bulletin of Laws* (in Russian and French), St. Petersburg, December 29, 1909-January 11, 1910. To apply only so long as the Treaty of Commerce and Navigation of 1850 remains in force.
- 12 FRANCE—SWITZERLAND. Exchange of ratifications at Paris of two treaties, signed at Paris, December 16, 1908, in regard to (1) a railroad between Martigny and Chamonix and (2) between Nyon and Divonne-les-Bains. Promulgation decree issued by President Fallières, November 23. *J. O.*, November 26.
- 15 HAITI—UNITED STATES. Exchange of ratifications at Washington of Arbitration Convention signed at Washington, January 7, 1909. Ratification advised by Senate, February 13; ratified by the President, March 1, by Haiti, March 22. Proclaimed November 16. *U. S. Treaty ser.*, No. 535. See Supplement to this Journal, p. 137.

November, 1909.

- 15 INDIAN COUNCILS ACT, 1909. Date set on which the provisions of the Act shall come into operation. The new Provincial Councils will assemble early in January and the Imperial Council the same month. *Cd.*, 4987; *Times*, November 16, December 6 and 21.
- 15 INTERNATIONAL CONFERENCE for the repression of the use of saccharine, opened at Paris. *Mém. dipl.*, November 21.
- 16 CAPE COLONY. The Cape to Cairo Railway reached the Congo frontier. *Imperial and Asiatic Quarterly Review*, January, 1910.
- 16 FRANCE—ETHIOPIA. President Fallières promulgated a law extending consular jurisdiction to French citizens and protégés in Ethiopia. *R. Generale de Dr. Int. Public*, 16:680; *J. O.*, November 18.
- 16 GREAT BRITAIN—PORTUGAL. Exchange of notes, renewing for further period of five years the arbitration agreement signed at Windsor, November 16, 1904. *Treaty ser.*, 1909, No. 32; *Mém. dipl.*, November 21; *R. Generale de Dr. Int. Public*, 16:682.
- 16 ITALY—SWITZERLAND. Exchange of notes at Rome renewing the Arbitration Convention of November 23, 1904, for a further period of five years. *R. Generale de Dr. Int. Public*, 16:683.
- 16-17 INTERNATIONAL CONGRESS OF EDITORS. The meeting of the executive committee was held at Paris. The next meeting of the committee will be held at Amsterdam in July, 1910, at which time and place the next (VIIth) Congress will be held. *Le Droit D'Auteur*, 23:28.
- 21 ITALY—NETHERLANDS. A general arbitration treaty was signed at Rome. *Mém. dipl.*, November 28; *Nederlandsche Staatcourant*, December 31.
- 22 RUSSIA. An imperial ukase forbids the Finnish Senate from sending to future international congresses special delegates. *Mém. dipl.*, November 28.
- 23-Dec. 7 GERMANY—GREAT BRITAIN. Exchange of notes extending the renewal of the Arbitration Agreement of July 12, 1904, for a further period of four years. *See Treaty ser.*, No. 20, 1909. *Treaty ser.*, No. 36, 1909.
- 27 TRANSANDINE RAILWAY TUNNEL. The Andes were pierced on this date though the tunnel is not expected to be ready for trains before May 25, 1910, the centenary of the revolution which gave both interested nations, Argentine Republic and Chile, independence. *B. A. R.*, February, 1910.

November, 1909.

- 29 BELGIUM—GERMANY—GREAT BRITAIN reach agreement on Eastern Congo Boundary, *R. of R.*, January, 1910; *Times*, January 1 and 12.
- 29 CHILE—UNITED STATES, request King Edward to act as arbitrator in the Alsop claims. *R. of R.*, January, 1910; *Mém. dipl.*, November 28; *American Polit. Science R.*, IV:42.

December, 1909.

- 1 BULGARIA—TURKEY. Agreement providing for the reciprocal transformation of their Commercial Agencies into Consulates, subject to the prescriptions of European international law, signed at Constantinople. *Times*, December 3.
- 2 SOUTH AFRICA. Royal Proclamation declaring that on and after May 31, 1910, the Colonies of the Cape of Good Hope, Natal, The Transvaal, and the Orange River Colony shall be united in a Legislative Union under the name of the Union of South Africa. Herbert John Gladstone, Secretary of State for Home Affairs, accepted, on November 19, the post of Governor-General. *London Ga.*, December 3; *Times*, December 4; *L'Union Sud-Africaine*, in *Q. dipl.*, 13:612, 665.
- 3 FRANCE—GREAT BRITAIN. Order in Council causing the additional extradition convention, signed at Paris, July 29 (q. v.) to apply to France from December 13; to Tunis after the same date; but to be suspended as to Canada during the continuance in force of the Canadian Act of 1906 regarding the extradition of fugitive criminals. *London Ga.*, December 3.
- 10 NOBEL PEACE PRIZE awarded by the Norwegian Storthing to Baron d'Estournelles de Constant, French, and M. Beernaert, Belgian. The Physics Prize went to William Marconi, Italian, and Ferdinand Braun, German; that in Chemistry to Wilhelm Ostwald, German; in Medicine to Theodor Kocher, Swiss; and in Literature to Selma Lagerlof, Swede. *Times*, December 11; *World (New York) Almanac*, 1910.
- 16 NICARAGUA. President Zelaya sends his resignation to Congress. *R. of R.*, January, 1910; *Times*, December 27.
- 17 BELGIUM. King Leopold died, on the 44th anniversary of his reign. *Leopold II. Africain*, *Mém. dipl.*, February 6. For memoir, see *Times*, December 17.

December, 1909.

- 19 INTERNATIONAL INSTITUTE OF AGRICULTURE at Rome. The General Assembly closed. *Mém. dipl.*, December 26.
- 23 FRANCE—SWITZERLAND. Council of State ratified the Convention on the Approaches to the Simplon. *Times*, December 24; *Mém. dipl.*, December 26. *Q. dipl.*, 13:705.
- 23 BELGIUM. Coronation of King Albert at Brussels. *Times*, December 24.
- 25—Jan. 3 FOURTH INTERNATIONAL SANITARY CONVENTION of the American Republics was held at San José, Costa Rica. *B. A. R.*, February, 1910.
- 26—31 NINTH ZIONIST CONGRESS held at Hamburg. *Mém. dipl.*, January 2; *Times*, January 1 and 8.
- 28 FRANCE—VENEZUELA. France having insisted upon the arbitration of claims of French citizens expelled by Castro, Venezuela terminates her diplomatic mission to France. *R. of R.*, February, 1910.
- 31 COLOMBIA—FRANCE. Decree signed by President Fallières promulgating the arbitration convention, signed at Bogota, December 16, 1908. Ratifications were exchanged at Bogota, October 6, 1909. *J. O.*, January 6; *Mém. dipl.*, January 9.

January, 1910.

- 1 INTERNATIONAL OFFICE OF PUBLIC HYGIENE. By this date Australia, Bulgaria, Persia, and Sweden have adhered to the arrangement signed at Rome, December 9, 1907. *See J. O.*, October 21, December 25, November 3 and August 31, respectively. *See November 17, 1908. Treaty ser.*, No. 1, 1910, for Bulgarian adhesion.
- 1 POSTAL ARRANGEMENTS went into effect: (1) For exchange of *postal parcels* between Mexico on the one hand and Nicaragua and Costa Rica on the other; (2) For *direct exchange of money orders* on the basis of the Rome arrangement; between Japan and Greece and Japan and Peru; (3) For exchange of *money orders* between Great Britain and Greece; (4) For exchange of *telegraph money orders* between Great Britain and Portugal; (5) The British post office made special agreement with the Western Union Telegraph Company for the exchange of *telegraph money orders* up to \$200 between Great Britain and the United States and Canada. *L'Union Postale*, 35:32.

January, 1910. •

- 2 CHINA—PORTUGAL. The Chinese Government refused to submit the Macao boundary question to arbitration, stating that only China and Portugal can settle the matter. *Times*, January 3; *R. of R.*, January, 1910. *O Economista Portuguez*, 7:108.
- 5 ARGENTINE REPUBLIC—URUGUAY. Protocol signed at Montevideo regarding the navigation and use of the waters of the River Plate and for the settlement of future differences arising in regard thereto. *Times*, January 7.
- 5 UNITED STATES. Secretary Knox announces that he has addressed a note to the governments signatory to the last Hague Conference, proposing that the International Prize Court established by the Second Hague Conference be transformed into an International Court of Justice. *R. dipl.*, January 16; *The Foundations of International Justice*, Davis, in *Independent*, March 10; *R. of R.*, February 1910; *Mém. dipl.*, January 9; *Advocate of Peace*, January and February.
- 6 CRETE. The Porte addressed an identical note to the four protecting Powers protesting against the Cretan Government's decision to require officials to take the oath to the King of the Hellenes and to have the Courts recognize and apply the Greek code, where possible, and declaring the action to be directed not only against Ottoman sovereignty but also against the Powers. *Times*, January 10.
- 6 INTERNATIONAL CONFERENCE at Brussels between England, Germany, and Belgium, *re* delimitation of boundaries of their African colonies. Postponed some weeks on account of death of King Leopold. *Mém. dipl.*, December 26; *Times*, December 25.
- 11 BRAZIL—PERU. Peruvian Congress sanctions the boundary treaty of September 8, 1909, q. v. *R. of R.*, February, 1910.
- 11 FRANCE—GREAT BRITAIN. Declaration signed at Paris, abrogating the agreement of November 8, 1899, respecting the exchange of press telegrams. *Treaty ser.*, No. 3, 1910.
- 17 MOROCCO. The German Foreign Office issued a White Book regarding the interests of German Mining Claims in Morocco, explaining the Government's attitude towards the Mannesmann claims. *Times*, January 18, 19, 20; *Q. dipl.*, 13:569; *Mém. dipl.*, January 23, 30; *R. dipl.*, January 23.

January, 1910.

18. UNITED STATES. President Taft signed proclamations admitting under the terms of the *minimum* tariff, imports to the United States from Great Britain, Italy, Russia, Switzerland, Spain, and Turkey. On January 29, Belgium, Denmark, Egypt, Netherlands, Norway, Persia, Portugal, and Sweden; on February 7, Germany; on February 9, Argentine Republic, Brazil, Liberia, Mexico, Panama, Paraguay, and Uruguay; on February 12, Aden, Malta, India, and Japan; on February 21, Abyssinia, Bolivia, British Guiana, Chile, Ecuador, Greece, Guatemala, Morocco, Peru, and the Portuguese Colonies; on March 1, Costa Rica, German East Africa, Kamerun, German South-West Africa and Togoland; Ascension, Ceylon, Channel Islands, Cyprus, East Africa, including Zanzibar and Pemba, Falkland Islands, Gibraltar, Isle of Man, Mauritius, New Guinea, North Borneo, St. Helena, Seychelles Islands, Sokotra, and Somaliland; Honduras, Korea, and Dutch East Indies; on March 2, Austria-Hungary; on March 8, Bermudas, Leeward Islands, Barbados, Jamaica, including Turks and Caicos Islands, Bahamas, the Windward Islands, Trinidad and Tobago, Cuba, Dominican Republic, Siam, and the Kongo; on March 19, France including Algeria. *Times*, January 19.
19. FRANCE—MEXICO. Decree of President Fallières promulgating the convention signed at Mexico, June 3, 1908, to assure the validity of marriages of their citizens celebrated before their respective diplomatic and consular officers. *J. O.*, January 21.
19. FRANCE—SWITZERLAND. Decree by President Fallières promulgating the convention relative to the improvement of the approaches to the Simplon, signed at Berne, June 18, 1909. *See* March 16, 1908, and December 23, 1909. *J. O.*, January 21.
21. GREAT BRITAIN—RUSSIA. The Tsar confirmed the decision of the Cabinet to extend to British subjects the rights granted to German subjects by the Convention of July 28, 1904, regarding expropriation of land inherited in the western provinces of Russia. *Times*, January 22.
23. CANADA—FRANCE. Convention signed at Paris, supplementary to the Convention regulating Commercial Relations between Canada and France, signed at Paris, September 19, 1907. Ratifications exchanged at Paris, February 1. *Treaty ser.*, No. 4, 1910; *J. O.*, February 13.

January, 1910. .

- 24 CASABLANCA INDEMNITY. The Commission appointed to settle claims for indemnity in connection with the anti-European outbreak in July, 1907, has awarded amounts to Great Britain, United States, Germany, France, Italy, Spain, and Portugal, as well as to certain Moorish citizens. *Times*, January 25; *Q. dipl.*, 14:189; *Mém. dipl.*, January 30.
- 24 CHILE—PANAMA. Postal Convention signed at Panama.
- 26 INTERNATIONAL. Decree by President Fallières promulgating the international convention signed at Berlin, September 26, 1908, on the interdiction of the use of white (yellow) phosphorus in the match industry. Ratifications have been deposited at Berne by France, Germany, Denmark, Luxemburg, the Netherlands, and Switzerland. France adhered on November 26, 1909, for certain colonies; Spain, October 29, 1909; Great Britain, December 26, 1908, and for Orange River Colony, May 3, 1909. *J. O.*, January 29.

OTIS G. STANTON.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

UNITED STATES ¹

Appropriation for foreign intercourse, Explanations as to estimate of, 1910. 17 p. *Dept. of State*. (H. Doc. 458.)

Attorney-general, Annual report of the, 1909. 371 p., 1 tab. *Dept. of Justice*. (H. Doc. 104.) Paper, 30c.

Chinese, Treaty, laws and regulations governing the admission of. Ed. of Oct. 1909. 70 p. *Bureau of Immigration and Naturalization*. Paper, 10c.

——— Same. Ed. of Dec. 1909. Paper, 10c.

Dept. of State, Report, with accompanying papers, concerning expenditures by the, 1909. 35 p. *Dept. of State*. (H. Doc. 276.)

Diplomatic and consular appropriation bill, 1910-11. Hearings. 110 p. *H. of R. Committee on Foreign Affairs*.

Diplomatic and consular service, Report submitting H. 19255, making appropriations for the, for the fiscal year 1911. 6 p. *H. of R. Comm. on Foreign Affairs*. (H. rp. 311.)

Diplomatic service, Regulations governing appointments and promotions in the, and for the improvement of the personnel of the Dept. of State. Executive order. 1909. 4 p. *President*.

Extradition of fugitives from the United States in foreign jurisdiction, Memoranda relative to. 1909. 6 p. *Dept. of Justice*. Paper, 5c.

Fisheries commission of Great Britain and the United States, Work of the International, by David Starr Jordan. 1910. p. 181-186. *Bureau of Fisheries*. (Doc. 649.) Paper, 5c.

Fisheries on the high seas, International regulations of, 1910. p. 91-102. *Bureau of Fisheries*. (Doc. 647); *Same*, p. 77-90. (Doc. 646.) Paper, 5c. each.

France, Abrogation of commercial agreements between the United States and; collated by N. I. Stone. Nov. 1909. 4 p. (Tariff series 6d.) *Bureau of Manufactures*.

¹ When prices are given, the document in question may be obtained for the amount mentioned from the Superintendent of Documents, Government Printing Office, Washington, D. C.

Immigration laws and regulations of July 1, 1907. 7th ed. Oct. 7, 1909. 88 p. *Bureau of Immigration and Naturalization*. Paper, 10c.

——— Same. 8th ed. Dec. 15, 1909. Paper, 10c.

International waterways commission, 5th progress report of the, 1909. 11 p. *War Dept.* Paper, 5c.

Kongo; Report, with accompanying correspondence, touching the condition of affairs in the. July 29, 1909. 213 p. *Dept. of State*. (S. Doc. 147.) Paper, 10c.

Naval conference, held at London, England, Dec. 4, 1908–Feb. 26, 1909, Declaration signed by the delegates of the United States to the International. 1909. 79 p. *Dept. of State*. (Conf. S. Ex. Doc. A, 61st Cong., 1st sess.)

Steerage conditions, Partial report on. 1909. 46 p. *Immigration Commission*. (S. Doc. 206.)

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PHILIP DE WITT PHAIR.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF
INTERNATIONAL LAW

MATHER ET AL. V. CUNNINGHAM ET AL.

Supreme Judicial Court of Maine, April 15, 1909.

(74 Atlantic Reporter, 809)

Appeal from Supreme Judicial Court, Waldo County, at Law.

From an order of the probate court appointing Albert W. Cunningham administrator of the estate of Henry H. Cunningham, Augusta C. Mather and Helen E. Berry appeal. Case reported. Decree reversed.

The appeal was heard at the April term, 1908, of the Supreme Judicial Court, in said county, sitting as the Supreme Court of Probate.

At the conclusion of the evidence then presented some of which was in the form of admissions, the presiding justice made the following order:

This case having come on to be heard by me at the April term of the Supreme Judicial Court in Waldo county, I, the undersigned justice, being of opinion that questions of law are involved of sufficient importance and doubt to justify the same, and the parties agreeing thereto, the same is reported to the law court, and upon so much of the foregoing admissions and evidence as is legally admissible, together with the evidence to be taken by Lottie E. Lawry, commissioner appointed by the court for that purpose, the law court is to determine the rights of the parties.

This case is stated in the opinion.

The allegations in the petition for administration filed in the probate court, Waldo county, are as follows:

Respectfully represents Edward R. Cunningham of Washington, D. C., and Albert W. Cunningham of Rockland, in Knox county, that Henry H. Cunningham who last dwelt in Belfast, in said county of Waldo, died on the 10th day of June, A. D. 1905, in Shanghai, China, intestate; that he left estate to be administered, to wit, personal estate to the amount of at least \$20; that your petitioners are interested in said estate as heirs at law and next of kin; that said deceased left no widow, whose name is ———, and as his only heirs at law and next of kin, the persons whose names, residences, and relationship to the deceased are as follows:

Name.	Residence.	Relationship.
Edward R. Cunningham,	Washington, D. C.,	Brother.
Albert W. Cunningham,	Rockland, Me.,	Brother.
Helen E. Berry,	Rockland, Me.,	Sister.
Mrs. A. C. Mather,	Rockland, Me.,	Sister.

The "Reasons of Appeal" are as follows:

(1) Because the probate court in and for the county of Waldo had no jurisdiction in the premises.

(2) Because upon the allegations in the petition on which said decree was founded, that said Cunningham last dwelt in Belfast in said county, said probate court had no jurisdiction.

(3) Because said probate court had no jurisdiction to appoint an administrator upon the estate of said Henry H. Cunningham, for the reason that said Cunningham was not at the time of his death either an inhabitant or a resident of the county of Waldo, did not leave personal estate to be administered in said county, did not leave debts to any amount, and did not own any real estate in said county, and none of his estate was afterwards found therein.

(4) Because the facts set out in said petition upon which the jurisdiction and action of said court are predicated, viz., that the said Henry H. Cunningham last dwelt in said Belfast, and that there was at the time of filing said petition any estate of said Cunningham to be administered, are false and contrary to fact, and were well known by the petitioners asking for such decree so to be.

(5) Because said Henry H. Cunningham was not at the time of his decease a resident or inhabitant of said Belfast, but was a resident and inhabitant of Shanghai, China.

(6) Because there was no personal estate of said Henry H. Cunningham at the time of filing said petition to be administered.

(7) Because the estate of said Henry H. Cunningham had, prior to the filing of said petition, been entirely settled and closed up, and the estate distributed, by a competent court having jurisdiction thereof under the Constitution and law of the United States, to wit, the Consular Court of said Shanghai, China, by the action of which court all parties interested therein were bound and concluded.

(8) Because any jurisdiction assumed by said probate court or by the Supreme Court of Probate is in conflict with and in violation of the Constitution and laws of the United States, and draws in question the validity of the action and authority of the Consular Court of said Shanghai, exercised under and by virtue of the authority of the Constitution and laws of the United States, the last will and testament of said Cunningham having been duly proved, allowed, and settled, and his estate distributed thereunder by said Consular Court, by virtue of said authority by which acts all parties interested are bound and concluded.

(9) Because said Henry H. Cunningham, a citizen of the United States, but domiciled, residing, and being an inhabitant of Shanghai, China, died abroad, to wit, at said Shanghai, and by lawful testamentary disposition appointed one E. H. Dunning to take charge of and manage all of his property, and gave special directions in relation thereto, and all the property of said Cunningham was, by

virtue of the laws of Congress applicable thereto, taken possession of, managed, and disposed of by the said Dunning in accordance with said directions, and there is, and was at the time of taking out of said administration, no property of the said Cunningham remaining, and over the property so disposed of by said Dunning under said directions this court has and can exercise no jurisdiction.

(10) Because said Henry H. Cunningham left a last will and testament, and named an executor therein.

The will of the decedent is dated at "Shanghai, June 13, 1900," and was executed in the presence of two witnesses only, and begins as follows: "This is the last will of me Henry H. Cunningham, of Belfast, Maine, U. S. A. and residing in Shanghai, China."

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, SPEAR, CORNISH, and BIRD, JJ.

Littlefield & Littlefield and Arthur S. Littlefield, for appellants. W. Henry White and Dunton & Morse, for appellees.

SPEAR, J. This is an appeal from the decree of the probate court for Waldo county, dated September 11, 1906, appointing Albert W. Cunningham administrator of the estate of Henry H. Cunningham, deceased, and comes here on report. The agreed facts show that Henry H. Cunningham was born in 1838, in Swanville, county of Waldo, Me., of parents who were citizens of the State of Maine and resident and domiciled in said county and State. His parents continued to reside in Waldo county, Me., until 1865, when they removed to Manassas, Va. He resided with his parents in Waldo county in this State continuously from his birth until May 3, 1853, the last three years at Belfast, Me. In May, 1853, at the age of 15 he went to sea. In 1854 he went to Australia. About 1857 he was for a time a pilot on the river at Shanghai, China. He was never married, and at the time of his death his only heirs and next of kin were two brothers and two sisters. He died at Shanghai June 10, 1905, leaving an estate of personal property valued at over \$50,000. He left a will in which he undertook to dispose of his estate, executed in the presence of two witnesses. After his death proceedings were had before the United States Consul at Shanghai, China, for the settlement and distribution of his estate, and the various legatees have received their distributive shares, through the method usually observed there in the settlement and distribution of similar estates. The appellees, however, deny the right of the Consular Court at Shanghai to thus settle and distribute the estate of the decedent, upon the ground that he had never acquired a domicile in Shanghai; that his domicile continued, during all the years

of his absence, to be in Waldo county; that his will was not executed in accordance with the laws of Maine, having but two witnesses; and that his estate should be administered here as intestate property. Consequently they applied to the probate court for the county of Waldo for the appointment of an administrator to settle the estate. The appointment was made, from the decree of which the appeal before us was taken.

It therefore appears that but two issues, one of fact and one of law, are involved in the determination of this case. Each presents the same question: Did the decedent have a domicile in Shanghai at the date of his death (1) as a matter of fact; (2) as a matter of law? The burden is upon the appellants to establish the affirmative of both issues. *In re Tootal's Trust*, 23 Ch. Div. 532. We will first proceed to the issue of fact. Assuming, *arguendo*, that the decedent could acquire a legal domicile in Shanghai, do the necessary facts appear to support this conclusion? Domicile may be established in different ways, but two of which are involved in this case, domicile of origin and domicile of choice. It is conceded that the decedent had a domicile of origin in Waldo county. That domicile continued, whatever the wanderings of the decedent, until he acquired a new one in some other locality. In order to establish a domicile of choice evidence of three important facts must appear: (1) Abandonment of domicile of origin; (2) selection of a new *locus*; (3) the *animus manendi*. Technically, proof of (2) and (3) necessarily establishes (1). Putting these facts in the form of a definition, *Gilman v. Gilman*, 52 Me. 165, 83 Am. Dec. 502, says: "Domicile is said to be the habitation fixed in any place, without any present intention of removing therefrom." While the term "domicile" seems to possess more or less elasticity, there can be but one domicile of testacy or intestacy. It is in the latter sense in which it will be here treated.

We deem it unnecessary to consume much time in discussing the questions of fact. The evidence shows that the decedent was in Waldo county but once from the time he left it to the time of his death. In 1866 he returned to visit his father and mother, only to find that they had changed their residence to the State of Virginia. He had now neither property nor relatives left in this county. That he abandoned, and intended to abandon, his domicile of origin is too apparent to require comment. It is also established that he made his home, established his business and had his headquarters, from 1869 to the date of his death, in Shanghai, China. In fact, the evidence in the case does not tend to show that during these years he permanently resided at any

other place. We, therefore, find no trouble in determining that he selected Shanghai as his place of business and residence after 1869. While there is more or less conflict in the testimony respecting his intention to remain in Shanghai indefinitely, it cannot be reasonably declared upon the evidence that he had any present intention of removing from Shanghai or of coming back to the State of Maine. In other words, the court is of the opinion that had Henry H. Cunningham resided in England, France, or any State in the Union, from the time he left Belfast until the date of his death, under precisely the same circumstances that are found in connection with his residence at Shanghai, it would clearly appear that he had acquired a domicile of choice in either one of these localities where he had so resided. *Harvard College v. Gore*, 5 Pick. (Mass.) 370. The *animus et factum* concurred, and the *forum novum* was substituted for the *forum originis*.

The facts being sufficient to establish the domicile of the decedent upon the soil of any foreign country, including that part of China not affected by treaty relations, we now come to a new and more difficult problem: Can an American under any circumstances, whatever the facts, acquire, as a matter of law, a domicile in the province of Shanghai, China, a place where, by treaty, American law is substituted for the Chinese local laws? Although the decedent may have abandoned his domicile of origin, so far as his acts and intentions were concerned, yet it is conceded, if he was prevented by law from acquiring a domicile of choice, that his domicile of testacy or intestacy would continue from necessity to be that of origin. Therefore the case finally turns upon the question whether the decedent could, as a matter of law, acquire a domicile in Shanghai. This proposition raises two important questions: First, whether any good reason can be adduced from all the circumstances of the case why the usual law of domicile should not be applied to the decedent's residence in Shanghai; second, whether any decision or rule of law, admitting all the facts of domicile, intervenes to inhibit the acquisition of such domicile. The first question involves, *in limine* the effect upon the government and territory of Shanghai of the treaty relations between this country and China. These relations have been so clearly expressed in the English case, *In re Tootal's Trust*, that we adopt the following paragraph as a statement of their character:

The treaties do not contain any cession of territory so far as relates to Shanghai, and the effect of them is to confer in favor of British subjects special exemptions from the original territory jurisdictions of the Emperor of China,

and to permit them to enjoy their own laws at a specified place. Similar treaties exist in favor of other European governments and the United States.

Of course laws have been enacted by all the governments, including our own, to carry into effect upon the territory involved the treaty relations of the parties to the convention, but the broad fact that the treaty territory is exempt from local law, and under the rule of foreign law, raises all the questions that can affect the establishment of domicile upon treaty soil. We need not then inquire concerning the acts of Congress. To this situation is to be applied the law of domicile, its meaning, the reasons for it, its purpose.

To apply the law correctly we must first determine precisely what we mean by the term "domicile." While it is asserted in some courts that there may be two or more domiciles, it is yet true that there can be but one governing the settlement of estates. We have already referred to the elements of domicile, the *animus et factum*, but have not determined whether they must concur with reference to a community, or with reference to a locality, in order to establish domicile; but we are clearly of the opinion that domicile in one case can be asserted independent of locality. It expresses but little relation to society or community. As was said in *Harvard College v. Gore*, 5 Pick. (Mass.) 370:

The term "inhabitant," as used in our laws and in this statute means something more than a person having a domicile. It imports citizenship and municipal relations, whereas a man may have a domicile in a country to which he is alien, and where he has no political relations. As if an American citizen should go to London or Paris with an intention to remain there in business for the rest of his life, or if an English or French subject should come here with the same intention, they would respectively acquire a domicile in the country in which they should so live, but would have no political relations except that of local allegiance to such country.

It was also said in *Tootal's Trusts*:

The idea of domicile, independent of locality, and arising simply from membership of a privileged society, is not reconcilable with the numerous definitions of domicile to be found in the books. In most, if not all of those from the Roman Code to Story's Conflict, domicile is defined as a locality — as the place where a man is, his principal establishment, the true home. But it is useless to pursue the topic farther. Their Lordships are satisfied that there is neither principle nor authority for holding that there is such a thing as domicile arising from society and not connected with a locality.

This conclusion is in full harmony with the well-settled doctrine in this country. That is, ordinarily speaking, if a person has left his domi-

cile of origin and selected another locality, whether in another State or a foreign country, in which his home is located and his business established, without any intention of leaving, that locality is his domicile. It, therefore, appears that "domicile" in its usual sense does not present a complex or difficult problem. Ordinarily it is a pure question of fact, as was said in *Thorndike v. City of Boston*, 1 Metc. (Mass.) 242:

No exact definition can be given of domicile. It depends upon no one fact or continuation of circumstances, but from the whole taken together, which must be determined in each particular case. It is a maxim that every man must have a domicile somewhere, and also that he can have but one. It follows that his existing domicile continues until he acquires another, and, *vice versa*, by acquiring a new domicile he relinquishes his former one. Very slight circumstances must often decide the question. It depends upon the preponderance of the evidence in favor of two or more places, and it often appears that the evidence of facts tending to establish a domicile in one place would be entirely conclusive were it not for the existence of facts and circumstances of a still more conclusive and decisive character, which fixes it beyond question in another.

Therefore it is plain that it is the place, not the local laws, that becomes of paramount importance in determining the question of domicile; where, not under what laws, do the *animus et factum* concur.

There are now forty-seven States in the Union, nearly all differing in some respects with reference to the laws of descent, the right of inheritance, and the distribution of estates; but, in whatever State the decedent may be found, to determine his domicile no inquiry is made as to what laws shall govern the settlement of his estate, but where did he have a permanent abode. The same is true of the laws of Great Britain. England, Scotland, Ireland, and Wales, each has its own peculiar laws governing the descent and distribution of property, yet these laws are never consulted upon the question of domicile. The place is the issue, as will appear by a reference to the *Dr. Munroe Case*, 5 Madd. 379. •

Now, then, if the true legal meaning of domicile is to fix a locality, what is the reason for the law? Why may not an estate be settled wherever the owner happens to de cease? The reason is manifest. It is to establish stability and certainly with respect to the place where estates are to be settled. Otherwise great confusion and numerous difficulties might follow an attempt to settle estates in distant localities in which the decedent might happen to temporarily reside. It has therefore from reason and necessity been declared that all estates must be referred to some locality. For the purpose of making the place definite and certain, it has been established as a rule of law that it shall be the

soil where, at the time of decease, a person has a permanent abode, without any intention of removing therefrom. While the determination of domicile refers the settlement of an estate to a particular locality, it necessarily subjects it to the laws of that locality; but the underlying reason for the law of domicile is not to subject an estate to any particular law, but to fix its abode.

But it is forcibly urged that the term "domicile" necessarily implies subjection and obedience to the local laws, and that this can not be said to be true of a residence in Shanghai. The first part of the proposition is admitted, but the conclusion is not conceded. No good reason appears in support of it. What is meant by local laws? Undoubtedly that code of laws which governs the affairs of a certain prescribed jurisdiction. The laws of Maine are limited in authority to the territory of Maine. They have no force beyond the State line. They are strictly local. The same is true of the jurisdictional limitations of every foreign state; that is, the local laws are considered to be limited to the territory over which their jurisdiction extends. The ownership of the soil, therefore, controls the establishment of all local laws. Without consent of the owner, no extraterritorial law can be enacted within an independent jurisdiction, or extended to it. China is independent. It never released its ownership to the soil of Shanghai. Its sovereignty over its territory was retained. In *Tootal's Trusts* it is said:

The sovereignty over the soil of Shanghai remains vested in the Emperor of China with this exception: That he has by treaty bound himself to permit British subjects to reside at the place, for the purpose of commerce only, without interference on his part, and to permit the British Crown to exercise jurisdiction there over its own subjects, but over no other persons.

This description applies equally to the American treaty. Therefore whatever laws may have been extended by Congress to the province of Shanghai are operative, not upon American soil, but upon the territory of the Chinese Empire. How do these laws reach there? By treaty, permission of the Emperor.

Now it will probably be admitted that, had the Emperor extended by edict to this territory the identical enactments now governing Americans residing there, a Chinese domicile could be acquired under the laws thus promulgated. It is true that, instead of an edict declaring the law, the Emperor by consent permitted Congress to extend its statutes to the government of Americans in this treaty port. In other words, if the identical laws which now govern Americans upon this territory had been

promulgated by edict, instead of permitted by treaty, the estate of the decedent would, without question, have been conceded a domicile in Shanghai. Now, then, as a practical question, what logical reason can be given for declaring the existence of domicile in the one case and not in the other? The decedent would have lived under precisely the same laws and upon the same foreign soil. Although the Emperor had suspended some of the Chinese laws and permitted the extension of American law to the territory, yet the source of the law was the Emperor, who had never released his sovereignty over the soil.

Upon this point we quote from an able article in *The Law Quarterly Review* (volume 24, p. 444) by Prof. Huberich of Stanford University. In his analysis of Mr. Justice Chitty's opinion in *Tootal's Trusts*, he says:

It is quite immaterial that the Chinese law provides that persons of British nationality shall be governed by the rules of law prevailing in England, or by such laws as may be enacted and made applicable to them by the English authorities. The English law is operative in Shanghai as to certain persons and certain transactions only because it is permitted and adopted by the territorial sovereign.

The effect, also, of declaring domicile upon Chinese soil would be precisely the same whether the law governing the *locus* was Chinese or American. In either case, it would be the law that covered that particular locality with respect to Americans, and, as to them, would become the local law.

It would appear, then, that the only reason assigned for withholding from the decedent the right of Chinese domicile is that, while he lived upon Chinese soil, under Chinese sovereignty, he was subject to laws extended to the particular territory by treaty instead of by edict. We are able to discover neither logic nor reason for the distinction here suggested. The fundamental idea of domicile does not depend upon any distinction with respect to the source of the local law. A Chinese domicile gives the decedent's estate a fixed place of abode, and subjects it to the law governing the locality. Whether American law or Chinese law, it is, nevertheless, the law of the place, as to American citizens.

Prof. Huberich states it this way:

Where the requisite *factum* and *animus* are shown to exist there is no valid reason why an Englishman or an American should not be held to acquire a domicile in China. In respect of all matters which private international law refers to the law of the domicile he would be governed by the Chinese law, the law of the territorial sovereign. The law to which he would be subject would be none

the less the law of China because it provides that persons of British and American nationality shall be governed by such laws as their respective countries may enact to govern their nationals in China.

In the case before us the effect of denying a Chinese domicile absolutely defeats the will of the testator, and diverts the transmission of his property into unintended and perhaps objectionable channels.

On the other hand, no inequitable result can be reasonably predicated upon the declaration of such domicile. No injury can follow. The estate, if testate, is disposed of in accordance with the terms of the will, precisely as it would be here. That the will was attested by but two witnesses instead of three, as required in Maine, is immaterial to the issue. *Lyon v. Ogden*, 85 Me. 374, 27 Atl. 258. If intestate, the property of the estate is legally administered, as appears from the opinion of L. R. Wilfley, Judge of the United States Court for China, decided May 15, 1907, *In the Matter of the Probate of the Will of John Pratt Roberts*.¹ In this connection it may be proper to add that the record shows that 108 estates, testate and intestate, have been administered through the Consular Court at Shanghai since 1865.

In fine, in considering the reasons why the American law of domicile should not apply to American nationals in Shanghai, under the circumstances of this case, the court is unable to discover any substantial objection, nor has any been pointed out in any cited case. *Jacobs on Domicile*, § 361, in a brief summary of his analysis of Justice Chitty's opinion (*In re Tootal's Trusts*), pertinently suggests that no reasons are assigned even in this case, which, by *dictum*, squarely denies the right of Chinese domicile. Section 361 reads:

Here, then, we have, according to the uncontradicted evidence, (1) complete abandonment of English domicile of origin; and (2) residence in China with intention to remain there permanently. If this case is to be accepted as an authority upon this point, therefore, something more is necessary for the establishment by an American or a European of his domicile in a country in which European civilization does not prevail than abandonment of his domicile of origin, and mere residence with intention to remain permanently. What more is necessary has never been pointed out, although, doubtless, as Dr. Lushington intimates, a change of religion would be deemed sufficient.

The suggestion hinted at by the author, touching the effect of religion upon the domicile of American and European nationals in the East, is based upon a *dictum* in a passage found in the *Indian Chief*, 3 C. Rob. A. D. 22, in which Lord Stowell says:

¹ AMERICAN JOURNAL OF INTERNATIONAL LAW, vol. 2, p. 233.

In the western parts of the world alien merchants mix in the society of the natives, access and intermixtures are permitted, and they become incorporated to almost the full extent; but in the East, from the oldest times, an immiscible character has been kept up. Foreigners are not admitted into the general body and mass of the society of the nation; they continue strangers and sojourners as all their fathers were.

Dicta of a similar import are found in *Maltas v. Maltas*, 1 Rob. Eccl. 67-80, and *In re Tootal's Trusts*.

In the case cited the doctrine of immiscibility applies both to presumptions of law and fact. Mr. Justice Chitty in *Tootal's Trusts* defines the doctrine as follows:

The difference between the law, manners, and customs of Chinese and Englishmen is so great as to raise every presumption against such a domicile.

That is, an American may marry a Chinese woman, establish his business upon Chinese soil, accumulate a fortune there, raise a family, and declare his intentions of ever remaining, yet the influence of religion and customs of the community in which he has chosen to live and die is presumed to be so repugnant to the idea of Western civilization as to rebut all evidence of intention, however conclusive. The opinion of the learned justice, however, concedes that if the strong presumption against intention could be overcome, a domicile of choice in China might be acquired. We think it can be overcome.

In this enlightened age the doctrine of immiscibility cannot be accorded such weight as to establish a legal presumption against all other evidence tending to prove *animus*. In American jurisprudence, at least, it should be allowed to slumber with Quaker persecution, Salem witchcraft, and other kindred dogmas. Since the *dictum* of immiscibility was first declared, the world has experienced a revolution touching the national, commercial, and trade relations between the nations of the East and those of the West. Our conclusion, therefore, upon the first proposition is that no sound reason can be adduced against the practical application of the American law of domicile to Americans residing in China, when the *animus et factum* are found to concur.

This brings us to the second general proposition involved in the discussion: Is there any established principle of law which intervenes to prevent the practical application of the rules of American law of domicile to Americans residing in China? This precise point, so far as we are able to cover, has never been decided by any court of last resort. It has, how-

ever, been recently discussed and decided in the negative by L. R. Wilfley, Judge of the United States Court at Shanghai, China.

The leading authority upon this issue is the English case *In re Tootal's Trusts*, decided in 1883, in an opinion by Mr. Justice Chitty. It is, perhaps, fair to say that while the decision upon the point was pure *dictum*, it nevertheless, in legal effect, denies the possibility of a domicile of choice by a British subject. The issue presented to the court in this case involved the question of an Anglo-Chinese domicile. The real issue as stated by Mr. Justice Chitty is: "On principle, then, can an Anglo-Chinese domicile be established?" Following the analogy of the early English cases, establishing an Anglo-Indian domicile for English subjects, residing in India as members of the old East India Company, it was urged that an Anglo-Chinese domicile might be established for Tootal, an English subject who had lived in China with the *animus et factum* required to establish domicile; therefore the direct issue of Chinese domicile was not involved, and the case is not discussed by the learned justice from that standpoint, as appears from the following quotation from his opinion:

In these circumstances it was admitted by the petitioners' counsel that they could not contend that the testator's domicile was Chinese. This admission was rightly made. The difference between the religion, laws, manners, and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicile, and brings the case within the principles laid down by Lord Stowell in his celebrated judgment in the *Indian Chief*, 3 Rob. Adm. 29, and by Dr. Lushington in *Maltas v. Maltas*, 1 Rob. Ecc. 67, 80, 81.

From this paragraph it will be observed that the question of Chinese domicile was, by express admission of counsel, eliminated from the case. The discussion after this admission was upon a question not in issue, and necessarily pure *dictum*, as it was not in any sense essential to the decision of the case. But the statement of Mr. Justice Chitty immediately following this admission is the remark upon which he has established the legal impossibility of acquiring a Chinese domicile, and is therefore founded upon *dictum*, and *dictum* alone.

In the *Indian Chief Case*, Lord Stowell was considering the question of the condemnation of a ship and cargo. The ship was charged with the offense of trading with the public enemy. The case involved the question of enemy character as determined by residence and protection. The determination of these questions did not in any sense involve the capacity of either party to acquire a residence in a foreign country.

Yet upon these facts is based the opinion of Lord Stowell, in which he speaks of the "immiscibility" of character in the paragraph already quoted as a reason why an Eastern domicile can not be acquired by a British subject, and to which Mr. Justice Chitty alludes as a precedent for his conclusion. In *Maltas v. Maltas*, decided by Dr. Lushington, the question was as to rule that should govern the descent of the personal property of John Maltas who died in Smyrna. One of the questions discussed was whether the testator had acquired a residence in Smyrna; he having had a domicile of origin in Great Britain. While this question was alluded to, it is apparent from a most cursory examination that the question of domicile was in no sense involved in the case. With reference to the question of domicile the court summed up its conclusions as follows:

I wish to observe that I am desirous not to be supposed to have given an opinion upon any question not necessary to be decided in this case; my judgment, therefore, does not affect the question of domicile.

I give no opinion, therefore, whether a British subject can or can not acquire a Turkish domicile; but this I must say: I think every presumption is against the intention of British Christian subjects voluntarily becoming domiciled in the dominions of the Porte.

Yet the last part of this paragraph is the passage cited as a precedent.

It is obvious then that the extracts cited from these cases as precedents are themselves pure *dicta*. It as manifestly follows that Mr. Justice Chitty's discussion upon the question of Chinese domicile was not only *dictum* itself, but founded upon *dictum*. The cases, therefore, upon which he relies for his conclusion by no means justify the statement that "the difference between the religion, laws, and manners of the Chinese and of Englishmen is so great as to raise every presumption against such a domicile," and *Tootal's Trusts* cannot be regarded as an authority for denying, as a presumption of law, the incompetency of acquiring a Chinese domicile.

We agree, however, with Mr. Justice Chitty upon the real issue before him for decision. An Anglo-Chinese domicile would certainly be of immiscible character. The Anglo-Indian domicile was so regarded by Mr. Justice Chitty himself, who says of the cases establishing the doctrine: "These authorities are generally admitted to be anomalous." While they may be regarded as anomalous in an attempt to establish a double domicile, a thing unknown to any rule of law and impossible in practice, they may be made, by a fair analysis, precedents in fact, if

not in name, for a straight Indian domicile in the anomalous cases considered, and for a straight Chinese domicile in the case at bar.

In its practical application, what does Anglo-Indian mean? It is simply the invention of a name. No new feature except the name appeared in any of these cases that did not comport with all the general rules of acquiring a domicile in India. In alluding to this compound domicile Baggallay, L. J., in *Ex parte Cunningham, In re Mitchell*, 13 Q. B. Div. 418, remarks:

There are some anomalous cases in which a subject of the Queen had entered into the service of the Old East India Company, and it was held that he had acquired what was called an Anglo-Indian domicile.

The phrase "what was called an Anglo-Indian domicile" is significant, and disclosed that, in the mind of the learned justice, no such domicile could be legally said to exist. It appears, as already stated, that the Anglo-Indian domicile was declared upon the ground that the East India Company was a permanent institution in India, and that those persons who entered its employ were, *ipso facto*, presumed to have abandoned their domicile of origin and to have become permanently located in India.

Cotton, L. J., in the same case, takes emphatic exception to the elements of fact which the old cases declare are capable of constituting an Anglo-Indian domicile. He says:

It is said that a Scotchman by entering the service of the East India Company acquired an Anglo-Indian domicile. I take exception to the expression "by entering the service" of the East India Company. The ground of the decision in those cases was that the officer was residing in India under circumstances which showed that he intended to abandon his domicile of origin, under circumstances which rendered it his duty to reside there permanently. It was not the entering the service, but the residence in India under circumstances which required him to remain there, which caused the change of domicile.

This is really what was said by Wood, V. C., in *Forbes v. Forbes, Kay*, 356:

When an officer accepts a commission or employment, the duties of which necessarily require residence in India, and there is no stipulated period of service, and he proceeds to India accordingly, the law, from such circumstances, presumes an intention consistent with his duty, and holds his residence to be *animo et facto* in India.

In other words, the learned justice eliminates the East India Company, which made whatever domicile was acquired dependent, not upon the East India Company at all, but upon a permanent residence in India.

But eliminating the East India Company eliminates the component "Anglo" from Anglo-Indian, and leaves the Indian domicile only. The logic of these cases is that Anglo-Indian was a misnomer, as duty can not be considered superior to volition in power to fix intention.

On the other hand, the whole trend of modern authority is in opposition to the *dictum* advanced in *Tootal's Trusts*. Judge Wilfley of the United States Court for China sitting at Shanghai in 1907, in *Re Probate of the Will of Young J. Allen*,² announced a strong opinion in which he rejects the *dictum* in *Tootal's Trusts* and comes to a directly opposite conclusion. The facts in the case are very similar to those in the case at bar. After an elaborate and exhaustive review of the authorities and text-writers, he comes to the conclusion:

First. "That there is nothing in the theory or practical operation of the law of extraterritoriality inconsistent with or repugnant to the application of the American law of domicile to American citizens residing in countries with which the United States has treaties of extraterritoriality."

Second. "That Dr. Young J. Allen, having lived in China for a period of forty-seven years, and having expressed his intention to live there permanently, thereby acquired an extraterritorial domicile in China; consequently this court in the administration of his estate will be guided by the law which Congress has extended to Americans in China, which is the common law."

We wish to say, however, that we do not agree with Judge Wilfley in employing the name "extraterritorial domicile." It appears to be inconsistent with the fundamental idea of domicile, which, as we have endeavored to show, is a relation between an individual and a particular locality or country. The fact that the law governing the particular locality is extraterritorial does not make the domicile extraterritorial, since it is immaterial upon the question of domicile from what source the law is proclaimed, as before shown.

This same view is taken by Prof. Huberich in the article already alluded to, in which he says:

The choice of the words "extraterritorial domicile" is unfortunate, in that it is likely to convey the idea of exemption from the laws of the territorial sovereign.

Sir Francis Piggott, Chief Justice of Hong Kong, in a recent work, expresses the opinion

that when the question is again raised it will be found that the principles established by the most recent cases necessitate a reconsideration of the law laid down on the subject by Mr. Justice Chitty.

² AMERICAN JOURNAL OF INTERNATIONAL LAW, vol. 1, p. 1029.

As a result of his discussion he further concluded:

A man may set up his home in a treaty port; he may have banished forever the idea of returning to his native country; the *animus manendi* may be clear, without shadow of doubt; on the hypothesis, too, there is a body of law regulating the community. Why is it impossible, then, for the ordinary principles of the law to be applied, and for the personal relations of the permanent members of the community to come under that law permanently as the law of the domicile of their choice, of those who are born members of the community as the law of the domicile of their origin? * * * Linking these two propositions together, it is suggested that the inevitable result is a modification of Lord Watson's interpretation of the law of domicile referred to above on the following lines: The law which regulates a man's personal status must be that of the governing power in whose dominions his intention is permanently to reside, or must be so recognized and established by that governing power as to be in fact the law of the land.

Lord Watson's interpretation was that domicile must be referred to locality, and not community.

Hall, a distinguished authority on international law, in his work on the *Foreign Jurisdiction of the British Crown*, also takes issue with the views expressed in *Tootal's Trusts* upon the ground of expediency, and says:

It is perhaps to be regretted that a change in the law is not made, which a short order in council could easily effect. Anglo-Oriental domicile has its reasonable, it may almost be said its natural, place.

This suggestion clearly shows that in the opinion of the learned author the doctrine of immiscibility, which has been made the fundamental objection to the possibility of an Eastern domicile, should no longer be regarded as a potential reason for denying such domicile. He further says upon the question of expediency:

So long as persons have not identified themselves with the life of a new community, they must keep each his own law; but, as soon as they have shown their wish and intention to cut themselves adrift from the association of birth, they prove their indifference to the personal law attendant on their domicile of origin. There is therefore no reason why simplicity and unity of law should not be gained for British subjects by attributing community in the laws of England to all of European blood. There is also every reason for avoiding very grave difficulties of another kind, which are opened through invariable preservation of the domicile of origin. English families, even in the present day, often remain through more than one generation in oriental countries as their permanent place of abode. Formerly the history of persons whose domicile might become a matter of importance was generally known sufficiently well. Many are now of obscure antecedents, and of an origin uncertain among the numerous places from which

British subjects can derive. As no domicile can be acquired in an Anglo-Oriental community, it becomes every year more probable that cases will occur in which the determination of the domicile of a father, perhaps of a grandfather, may become necessary, and in which it may be equally impracticable to impute an English domicile or to attribute any other with fair probability. It would be a great advantage that in such cases there should be a fixed rule which should correspond with the obvious facts, and that the courts, instead of searching with infinite trouble and expense for an ancestral domicile, should be enabled to find that a domicile had been acquired in the Eastern country which carried with it the application of English law.

Prof. Huberich upon this point says:

The English view, it is submitted, is based on erroneous conceptions of domicile and extraterritoriality. It is supported by the authority of a single case (*Tootal's Trusts*), has been vigorously attacked, and may be repudiated by courts not bound by the precedent.

In reviewing Judge Wilfley's opinion, he says: "The result of the case is correct."

Westlake, in his *Private International Law*, takes the same view, and points out the inconsistency of the opinion in which Mr. Justice Chitty declared: "There is no authority that I am aware of in English law that an individual can become domiciled as a member of a community which is not the community possessing the supreme or sovereign power" having said in the same connection: "It may well be that a Hindoo or Mussulman sitting in British India, and attaching himself to his own religious sect there, would acquire an Anglo-Indian domicile." Westlake says: "The Hindoos or Mussulmans are as little the supreme or territorial power in India as the English are such in China." This discrepancy serves to point out the complexities that arise in an attempt to deny or modify the application of the rational and established rules of law.

The theory of this opinion is in accordance with the application of the ordinary rules of law touching the question of domicile. We have found no difficulty, and discover no error, in referring the existence of domicile to locality. We allude to this matter for the purpose of avoiding any confusion which might arise in reading the text-writers cited in connection with the opinion. While they all advocate the legal propriety of holding that an American national or an English national may acquire a domicile in a treaty port, they suggest, if we interpret them correctly, that such a domicile may be referred to community rather than locality. The reference of Sir Francis Piggott to "a modification of Lord Watson's

interpretation of the law of domicile" relates to this precise point. We concur in the result of their conclusions, but not in the method of reaching it.

Upon both reason and authority we are of the opinion that the domicile of the decedent, living in a country that granted extraterritorial privileges, should be determined by the same rules of law that apply to the acquisition of domicile in other countries. In support of this position we refer to the reasons cogently and comprehensively expressed in Judge Wilfley's opinion. In the language of Prof. Huberich the result here reached, it is submitted,

preserves intact the theory that domicile is a legal relation between an individual and a particular country, and involves a certain submission to the laws of such country as the laws of the territorial sovereign. It upholds the doctrine that each state is supreme over all persons and things within the territorial boundaries. It does away with an anomaly in the law of domicile, and enables the courts to recognize the legal existence of a domicile where the facts and intent ordinarily requisite are present.

The court is of the opinion that Henry H. Cunningham, the decedent, at the time of his decease, had abandoned his domicile of origin in Waldo county, Me., and had acquired a domicile of choice in Shanghai, China. Therefore, in accordance with the stipulations in the report, the entry must be:

Appeal sustained.

Decree of the court below reversed.

GUILLERMO ALVAREZ Y SANCHEZ, APPELLANT, V. THE UNITED STATES

Supreme Court of the United States, February 21, 1910

Mr. JUSTICE HARLAN delivered the opinion of the court.

The appellant, an inhabitant and citizen of Porto Rico, seeks to recover from the United States the value of a certain office held by him in that Island before and during the war with Spain, of which office, it is alleged, he was illegally deprived by the United States. A demurrer to the complaint was sustained and judgment given for the United States, the opinion of the Court of Claims being delivered by Chief Justice Peele, 42 Ct. Cl. 458, 472.

The complaint which, on demurrer, was adjudged to be bad, presents — using substantially the words of the complaint — the following case:

In the year 1878 the claimant, Sanchez, purchased from one Florenzio

Berrios y Lopez, for a valuable consideration, the office known as "Numbered Procurador [Solicitor] of the Courts of First Instance of the capital of Porto Rico," at Guayama, in perpetuity, and in the same year the Governor General of Porto Rico issued a provisional patent in his favor. In 1881 the claimant's tenure of the office was approved and confirmed, and a final patent therefor was issued by the King of Spain, in accordance with the laws, practice and custom of Spain and Porto Rico governing the sale, surrender and transfer of such an office. The claimant, it is alleged, thereby became vested with all the legal rights and privileges appertaining to the office.

From the date of the provisional patent issued to him until, as will be presently stated, he was deprived of his office, August 31st, 1899, the claimant exercised all the rights and privileges belonging to the office of Procurador or Solicitor. Under the laws of Spain and Porto Rico, it will be assumed, the office was transferable in perpetuity and vested the incumbent with exclusive rights and privileges, and as a consequence thereof the claimant was entitled under the laws of Spain in force in Porto Rico, during all the time he held the office, to perform its duties and receive its fees and emoluments which, prior to August 31st, 1899, averaged, it is alleged, more than \$200 per month, of which he could not be legally deprived except by due process of law.

On the 10th day of December, 1898, a Treaty of Peace between the United States and Spain was concluded and having been duly ratified by the respective countries, was duly proclaimed April 11th, 1899. The Treaty contained these provisions:

Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the Island of Guam in the Marianas or Ladrones. (Art. 7.)

* * * And it is hereby declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, can not in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals, of whatsoever nationality such individuals may be. (Art. 8.)

A military government was organized in Porto Rico and was maintained there from October, 1898, up to and after April 30th, 1900. On the latter date, General Davis, as Military Governor, issued what is known as General Order 134, containing these among other paragraphs:

XI. The office of Solicitor ("procurador") is abolished. Those who have heretofore practiced as such before any court and are of good repute shall, in default of lawyers, have the right to be appointed municipal judges or clerks of Municipal Courts.

XII. Hereafter, litigants who do not appear personally shall be represented before the Supreme Court and District Courts exclusively by a lawyer, no powers of attorney being necessary therefor; it shall be the duty of the courts to suspend from the practice of his profession any lawyer who shall, without authority, assume to represent a litigant; but this shall not affect the civil or criminal liability which such lawyer may thereby incur. In the Municipal Courts, litigants may represent themselves or may be represented by an attorney in fact, resident of the place.

XIII. For the purpose of conducting the proceedings, lawyers may make use of such agents as they may by writing designate to the court.

That order was issued without notice to claimant and without any complaint being made as to the manner in which he was exercising his rights or discharging his duties.

On the 12th day of April, 1900, Congress passed (to take effect May 1st, 1900) what is known as the Foraker Act temporarily to provide revenues and civil government for Porto Rico and for other purposes. That act contained this provision:

Sec. 8. That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended or modified hereinafter, or as altered, or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico, or by act of Congress of the United States. (31 *Stat.* 77, 79, c. 191.)

The reasonable value, the claimant alleges, of the "transferable" or "Numbered Procurador of the Courts of First Instance of the capital of Porto Rico," in perpetuity, was \$50,000, for which amount he asks judgment. No compensation has ever been made to claimant for the loss of his office, and no action has been taken on his present claim either by Congress or by any Department of the United States Government.

Such is the case made by the claimant in his petition.

The claimant proceeds in his petition on the ground that the effect of the 8th section of the Act of Congress of April 12th, 1900, was to confiscate, finally and effectually, without compensation to him, the office which he claims to have lawfully purchased in perpetuity, prior to the occupation of Porto Rico by the military forces of the United States,

and the cession of that Island to this country; which confiscation, he insists, could not have been legally done without violating the Treaty between the United States and Spain which was in force when the Act of 1900 was passed.

We do not think that the present claim is covered by the Treaty. It is true that a Treaty negotiated by the United States is a part of the Supreme Law of the Land, and that it is expressly provided in the Treaty in question that it "can not in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds * * * of private individuals." But, clearly, those provisions have no reference to public or quasi-public stations, the functions and duties of which it is the province of government to regulate or control for the welfare of the people, even where the incumbents of such stations are permitted, while in the discharge of their duties to earn and receive emoluments or fees for services rendered by them. The words in the Treaty "property * * * of private individuals," evidently referred to ordinary, private property, of present, ascertainable value and capable of being transferred between man and man.

When the United States, in the progress of the war with Spain, took firm, military possession of Porto Rico, and the sovereignty of Spain over that Island and its inhabitants and their property was displaced, the United States, the new Sovereign, found that some persons claimed to have purchased, to hold in perpetuity, and to be entitled, without regard to the public will, to discharge the duties of certain offices or positions which were not strictly private positions in which the public had no interest. They were offices of a quasi-public nature, in that the incumbents were officers of court, and in a material sense connected with the administration of justice in tribunals created by government for the benefit of the public. It is inconceivable that the United States, when it agreed in the Treaty not to impair the property or rights of private individuals, intended to recognize, or to feel itself bound to recognize, the salability of such positions in perpetuity, or to so restrict its sovereign authority that it could not, consistently with the Treaty, abolish a system that was entirely foreign to the conceptions of the American people, and inconsistent with the spirit of our institutions. It is true that Congress did not, we assume, intend by the Foraker Act to modify the Treaty, but if that act were deemed inconsistent with the Treaty the act would prevail; for, an Act of Congress, passed after a Treaty takes effect, must be respected and enforced, despite any previous or existing Treaty pro-

vision on the same subject. *Hijo v. United States*, 194 U. S. 315, 324, *and authorities cited*. If, originally, the claimant lawfully purchased, in perpetuity, the office of Solicitor (Procurador) and held it when Porto Rico was acquired by the United States, he acquired and held it subject, necessarily, to the power of the United States to abolish it whenever it conceived that the public interest demanded that to be done. The intention of Congress in relation to the office of Solicitor or Procurador by the Foraker Act can not be doubted — indeed, its abolition by Congress is made the ground of the present action and claim. Upon the acquisition of Porto Rico that Island was placed under military government, subject, until Congress acted in the premises, to the authority of the President as Commander-in-Chief acting under the Constitution and laws of the United States. Porto Rico was made a Department by order of the President on the 18th of October, 1898. By his sanction, it must be presumed, General Order No. 134 was made, abolishing the office of Solicitor or Procurador. That order was recognized by Congress, if such recognition was essential to its validity, when Congress, by the Foraker Act of 1900, provided that the laws and ordinances of Porto Rico, then in force, should continue in full force and effect, *except* “as altered or modified by military orders in force” when that act was passed. It is clear that claimant is not entitled to be compensated for his office by the United States because of its exercise of an authority unquestionably possessed by it as the lawful sovereign of the Island and its inhabitants. The abolition of the office was not, we think, in violation of any provision of the Constitution, nor did it infringe any right of property which the claimant could assert as against the United States. See *O'Reilly de Camara v. Brooke*, 209 U. S. 45, 49. The judgment of the Court of Claims must be affirmed. *It is so ordered.*

HENNEBIQUE CONST. CO. V. MYERS ET AL.

Circuit Court of Appeals, Third Circuit, August 19, 1909

(172 Federal Reporter, 869.)

GRAY, Circuit Judge: The appellant, as complainant below, on September 16, 1907, filed its bill in the United States Circuit Court for the Eastern District of Pennsylvania, against the defendants, the appellees here, alleging that letters patent of the United States, bearing date the 4th day of October, 1898, and numbered 611,907, had been issued to it

for a certain invention, particularly mentioned and described in the specifications attached thereto, which letters patent granted to the complainant the exclusive right to make, use, and vend the same for the term of seventeen years from the said 4th day of October, 1898. The bill then charges defendant with infringement of said letters patent, and prays for the usual injunctions, preliminary and final, restraining the said defendants, their agents, servants, etc., from further infringement or violation thereof, and for an accounting.

The defendants, after having filed an answer to the bill, by consent withdrew the same and filed a so-called plea to the jurisdiction of the court, alleging that under the provisions of section 4887 of the Revised Statutes, before its amendment by Act March 3, 1897, c. 391, § 3, 29 Stat. 692 (U. S. Comp. St. 1901, p. 3382), and as applicable thereto, the patent in suit expired August 8, 1907, prior to the filing of the bill of complaint, by reason of the expiration on that date of a French certificate of addition to a French patent, wherein and whereby the invention of the patent in suit had been previously patented by Hennebique in France.

The replication by complainant to the defendants' answer was allowed to stand as a replication to the plea. The case was heard upon an agreed statement of facts, which presented two points of law for decision, viz.:

First, whether a certificate of addition to what was in form a regularly issued French patent, but which has been authoritatively and finally adjudged by the French courts to be a nullity and of no effect in law, can limit the term of a later United States patent for the same invention, under section 4887 of the Revised Statutes,¹ before its amendment by the act of March 3, 1897?

Second, whether the said section 4887 has been abrogated by the treaty known as "An Additional Act for the International Protection of Industrial Property" (32 Stat. 1936), in so far as it provided for the limitation by prior foreign patents of the term of a United States patent which was existing at the time the said treaty went into effect?

[Judge GRAY answered the first point in the negative and stated:]

The view we have thus taken makes it unnecessary to consider the second point of law raised by the appellant, viz., whether the said section 4887 had been abrogated by the treaty known as "an additional act for

¹ Sec. 4887. No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country, shall be so limited as to expire at the same time with the foreign patent, etc.

the international protection of industrial property." But, if it is called for in order to support our judgment, I may say that I agree with the views on the subject expressed in the concurring opinion of Judge Archbald.

[BUFFINGTON, Circuit Judge, dissented.]

ARCHBALD, District Judge (concurring): I concur in the view that the Act of Congress, in limiting a patent in this country by the term of one previously granted for the same invention abroad (Rev. St., § 4887), presupposes that the foreign patent is valid, and, where this proves not to be the case, that the patent here continues for the full term of seventeen years which it would otherwise enjoy. * * *

In view, however, of the differences between the members of the court over this question, the effect of the treaty of Brussels, in my judgment, requires attention. The decree below certainly can not be affirmed without first considering it. By the convention concluded at Brussels December 14, 1900,² by the International Conference for the Protection of Industrial Property, at which the United States was represented, it was, among other things, ordained:

Art. 4 *bis*. Patents applied for in the different contracting states by persons admitted to the benefit of the convention under the terms of articles 2 and 3 shall be independent of the patents obtained for the same invention in the other states, adherents or nonadherents to the union. This provision shall apply to patents existing at the time of its going into effect. The same rule applies in the case of adhesion of new states to patents already existing on both sides at the time of the adhesion.

This convention was additional to that similarly concluded at Paris March 20, 1883,³ to which the United States was not originally a party, but subsequently gave its adherence, and was ratified by the Senate March 7, 1901, and proclaimed by the President, August 25, 1902, to go into effect September 14 following. 32 Stat. 1936. Taken as it reads, it provides for the absolute independence of previously interdependent domestic and foreign patents; and if self-executing, and not otherwise controlled, it relieves the patent in suit from the effect of the French patent to which reference has been made, whether valid or invalid.

It appears, however, that, at the first session of the same conference, in December, 1897, after the article in question had been formulated, Mr. Forbes, one of the delegates on the part of the United States, pointed out that, as it stood, it would apparently apply to patents existing at the

² See SUPPLEMENT to this JOURNAL, p. 154.

³ See SUPPLEMENT to this JOURNAL, p. 143.

time it was put in force, and that this would be contrary to [the spirit of] our laws, which do not permit of a retroactive effect being given them. He explained that the law in the United States, with regard to the interdependence of domestic and foreign patents, had been modified (evidently referring to Act March 3, 1897, amending Rev. St., § 4887 [U. S. Comp. St. 1901, p. 3382]), whereby the provision had been eliminated that the term of a patent here for an invention previously patented abroad should be limited to expire at the same time with it, but that this interdependence was retained as to patents delivered prior to January 1, 1898, their terms being fixed at the time of their issue, and that if article 4 *bis* was interpreted as extending to patents already issued, as it possibly might be, it would run counter to the principle of nonretroactivity with which our laws are inspired. To avoid the objection which might be raised by the United States upon this score, he inquired whether article 4 *bis* could not be made the subject of a special protocol. After a discussion of the subject by several delegates, in the course of which it was suggested by Mr. Morel, director of the International Bureau, that the article, while made to apply to existing patents, should be expressly limited in its effects to nullities and lapses subsequently occurring, it was proposed by Mr. Bellamy Storer, another of our representatives, that a proviso should be added: "However, the term fixed by the internal law of each country remains intact;" it being explained by him that this would only apply to patents in existence at the time the article went into force, the effect of which would be that patents delivered in the United States up to December 31, 1897 (the date to which the interdependence of foreign and domestic patents was preserved by the Act of March 3, 1897), would be limited by the normal term of patents previously issued for the same invention, the same as they were by the existing law. It was not deemed advisable by the conference, however, to make any changes in the text of the article, either that submitted by Mr. Storer or that suggested by Mr. Morel, but that it should receive, instead, the interpretation which the American delegation desired, and, with this understanding entered on the minutes, the article was finally adopted. That there may be no question as to this being a correct summary of the proceedings, they are produced in full in the margin.*

* December 13, 1897.

The new article relative to the reciprocal independence of patents is unanimously agreed to. This article which bears No. 4 *bis*, is expressed in the following terms:

"Art. 4 *bis*: Patents applied for in the various contracting states by persons

If this were all, it might perhaps be a question whether the construction so impressed on the article by common consent at the time of its adoption would not have to be respected, in accordance with which it would be restricted, so as not to interfere with or disturb the terms of patents issued or applied for in the United States up to December 31, 1897, which would be left as they stood by the existing law. And, in conformity with this, the patent in suit, having been applied for two days before the change, introduced by the act of March 3, 1897, went

admitted to the benefits of the convention under the terms of articles 2 and 3 shall be independent of patents obtained for the same invention in the other states, whether adhering to the union or not.

"This provision shall apply to patents in existence at the time of its being put in force.

"The same thing shall apply in the event of the accession of new states, to patents existing on either side at the time of accession."

* * * * *

December 14, 1897.

In regard to article 4 *bis* relating to the reciprocal independence of patents, Mr. Francis Forbes, delegate from the United States, makes the following remarks:

"According to the second paragraph the new order would apply 'to patents existing at the time of its being put into force.' Now, in the United States the law can not have a retroactive effect. The stipulation in question would therefore receive objections on the part of the American government, objections of such a nature as to retard the signing of the additional act."

Desiring to avoid this eventuality, Mr. Forbes inquires if article 4 *bis* could not be made the subject of a special protocol. The president consulted the conference on this question, in order to learn if it was agreeable to the conference to modify the text submitted for the signature of the delegates, or whether it would be sufficient to mention in the minutes the reservation made by the delegate from the United States.

Mr. Francis Forbes would readily accept the arrangement if it be clearly understood that it should not have a retroactive effect in his country. He explains that the law of the United States has been modified in relation to reciprocal independence. Patents delivered prior to January 1, 1898, however, remain dependent, so far as their term is concerned, upon the corresponding foreign patent taken out for the same invention; their term being fixed at the time of their deliverance. Now, it might happen that article 4 *bis* would be interpreted as meaning that all patents issued before the coming into force of the new law should extend during their entire term of seventeen years, while from the moment of their issuance these patents ought to be considered as limited in duration by the patents delivered at an anterior date. This interpretation could only be admitted in the United States by means of a special law, which would be contrary to the principle of nonretroactivity with which all American legislation is inspired.

* * * * *

into force, would be excepted out of the effect of the article, being limited by the French patent previously granted which is now brought forward, provided, of course, that that is the effect of it, valid or invalid.

It is to be noted, however, that, although a report of the work of the conference was made by our delegates, it was not ratified. But a second session having been held in December, 1900, and the subject having again come up, article 4 *bis* was adopted, with others, in the exact form in which it had before been agreed to; and the treaty, of which it was a

Mr. Dubois, delegate from Belgium, is of the opinion that article 4 *bis* is designed only to produce effects after the patent has been issued, and consequently it is not contrary to the American law. It is really not the purpose to retroactively modify the normal term of the patent, which remains such as it was fixed by the law in force at the time of its issuance.

Mr. Francis Forbes insists on the necessity of stating this point very precisely, in order to avoid errors of interpretation, which would have very regrettable consequences, in case of the acceptance of the additional act by the United States.

Mr. Morel, director of the International Bureau, calls attention to the object aimed at by the conference in voting article 4 *bis*. He believes that satisfaction might be given to Mr. Forbes by introducing a condition in the second paragraph of this article, excepting very explicitly incidents which are anterior to its being put into force. He suggests for this paragraph the following amendment:

"This provision shall apply to patents in existence at the time of its being put into force. Its effects are, however, limited to nullities and lapses which would affect anterior patents."

Mr. Michel Pelletier, delegate from France, remarks that, the reciprocal principle of independence being admitted, it is not advisable to restrict same by new provisions.

Mr. Dubois gives his opinion as to the situation which will result from the article 4 *bis*. This establishes the principle of independence as to incidents, notably lapses and nullities, which may occur after the issuance of the patents: but the internal law can freely fix the normal duration of the patent taken out in the country.

Mr. Michel Pelletier also expresses the opinion that the independence has the precise effect of suppressing all relations between the various patents, and leaves to each national law the care of regulating all matters pertaining to patents taken out in the country.

His Excellency, Mr. Bellamy Storer, delegate from the United States, asks if the following words could not be added:

"However, the term fixed by the internal law of each country remains intact."

part, having been submitted to our government, was ratified by the Senate and proclaimed by the President, as already stated. The question now is whether it is to be taken as it reads, or whether it is to be qualified by the understanding at the time it was adopted at the first session of the conference.

There is no better example of the uncertainty introduced, when parol evidence is resorted to, to control the effect of a written instrument, than is afforded in the present instance. By the plain terms of the

This addition would, of course, only apply to such patents as exist at the time of the coming into force of the additional act. Its bearing in the United States would be: The patents delivered under the rules of the existing law — that is, until December 31, 1897 — would be limited by the normal duration of foreign patents of an anterior date, issued to the same inventor for the same invention. Their duration would then remain as it was at the moment of the coming into effect of the existing law.

The president proposes to leave the text of article 4 *bis* without any change, and to state in the minutes of the meeting that this article should receive the interpretation which has just been indicated. The American delegation would thus obtain complete satisfaction.

* * * * *

His Excellency, Mr. Bellamy Storer, declares this combination acceptable, if it meets with the unanimous adhesion of the conference.

* * * * *

Count Hamilton, delegate from Sweden, pronounces himself in favor of an addition to article 4 *bis* in the sense as indicated by Mr. Morel.

* * * * *

The Very Honorable C. B. Stuart Wortley, delegate from Great Britain, remarks that it is important, in the examination of the question, to take into consideration article 2 of the general convention, which guarantees to those under the jurisdiction of the contracting states, the benefit granted in each country to natives thereof. The subjects of Great Britain have then for their patents in the United States a right of protection for a period of seventeen years according to the American law.

* * * * *

Mr. De Ro, delegate from Belgium, supports the proposition of the president, to record in the minutes the harmony existing in the convention as to the effect of article 4 *bis*, to which proposition His Excellency, Mr. Storer, has kindly acceded.

* * * * *

The president puts to a vote the adoption of the text previously adopted for article 4 *bis*, with the interpretation which the American delegation desire to specifically point out by proposing to complete the second paragraph by supplementing this explanatory clause:

“However, the term fixed by the internal law of each country remains intact.”

Article 4 *bis* is definitely adopted with these conditions.

article foreign and domestic patents are rendered independent, and this provision is expressly made to apply to existing patents without any apparent restriction or qualification; complete independence being substituted for the previous interdependence by which up to that time they had been hampered. The objection raised to this by the delegates from the United States, as we have seen, was that it might be held to operate retroactively, and in that way enlarge the term of existing patents, which would otherwise be restricted by the limitations imposed by the law as it stood at the time they were granted. In the course of the discussion which followed it was suggested by other delegates that this could be met and disposed of by confining the effect of the provision to nullities and lapses, establishing the principle, as it was said, of independence as to incidents occurring afterwards. But this did not meet with favor. And it was finally agreed that the article should be adopted as it had been formulated, with the interpretation desired by the United States delegates, entered on the minutes, to qualify it, that "the term fixed by the internal law of each country remains intact"—meaning, in the light of the context, that the article was not to be retroactive, but that existing patents were to continue to have the limited term imposed upon them at the time they were granted by the term of a foreign patent previously obtained for the same invention. And yet we have the delegates from this country, when they came to make their report, stating that:

It was the unanimous sense of the conference that the paragraph was not applicable to existing United States patents, but only to those patents whose terms might be shortened by the laws of those states of the union in which provision is made for a shortening of the term on the lapsing of patents for the same inventions in other states.

Or, as it is further explained, that the duration of a patent here, being determined by the state of the law at the time it was granted, "is unaffected by the subsequent expiration of a foreign patent for the same invention by reason of non-payment of taxes or non-working." But this is exactly what the conference did not agree to, if I understand the proceedings. Indeed, if the only independence proposed by the article was as to lapses and forfeitures of previous patents for the same invention in other countries, the objection made by our delegates, as well as the resulting discussion and the amendments proposed to overcome it, were without point and meaningless; it being well settled, as must have been known to them, that, under section 4887, patents in the United States

are only limited by the normal term of foreign patents, and that the lapsing or falling in of the latter for non-payment of renewal fees or similar incidents have no effect on the term of a subsequent patent for the same invention here. *Pohl v. Anchor Brewing Company*, 134 U. S. 381, 10 Sup. Ct. 577, 33 L. Ed. 953; *Bate Refrigerating Company v. Sulzberger*, 157 U. S. 1, 15 Sup. Ct. 508, 39 L. Ed. 601.

Assuming, then, that we were at liberty to go outside of the article as it stands, which interpretation of it is to be taken — that reported by our delegates (which is the only one, by the way, that was likely to have been brought to the Senate, so as to influence it in ratifying, if that is of any consequence), as to the incorrectness of which there can be no question, or that derived from the minutes of the proceedings, as they appear in the journal of the conference, which alone can be regarded as having been carried forward into the result of the succeeding session, which is insisted on? It may be that either view favors the defendant. But that is not the question. The article must not be open by parol to a double construction, and that one must be adopted which will apply to all cases, not only in this country, but elsewhere. While the action of the conference was taken at the instance of the delegates from the United States to answer the objection that, contrary to the spirit of our laws, the article might be held to be retroactive, the explanation accompanying its adoption was not limited to patents here, but was of general application affecting all the States represented at the conference who might ratify it; and this dilemma might arise in consequence: That other States, relying on the minutes of the proceedings, would interpret the article one way, while the United States, under the lead of our delegates, would take it another, resulting in serious confusion and conflict. And that this is by no means an impossible situation, we find it declared by the French Government, as the reason for ratifying it, that all the inconveniences, arising from the reciprocal dependence of patents taken out in different countries, are made to disappear by the article in question, the effect of it being to suppress all connection between such patents, leaving to the law of each State the regulation of the terms of patents taken out in that country; a view, quite aside, as it will be noted, from that suggested in the report of our delegation. And the Italian Ministry of Agriculture, Industry, and Commerce, in May, 1903, being called on to make a deliverance upon the subject, while conceding that it was for the judiciary to determine the subject finally, as a matter of executive guidance in case of the demand for the patenting of an imported inven-

tion patented abroad, or of a claim of priority based on the filing there of an earlier application, also recognized that article 4 *bis* was in derogation of the existing statute law of Italy, which, the same as in the United States, limited the term of a domestic patent by the term of a patent for the same invention taken out before that in a foreign country; and that patents, thereafter applied for, should therefore be allowed the full term of fifteen years, provided by law, notwithstanding that the invention had been made public by the previous granting of a foreign patent for it, although applications for a patent of importation, resting on other principles and not being provided for by the conference, were in a different position.

But we are relieved from the necessity of going into this subject further. As already stated, there was no ratification of the action of the 1897 conference, and it cannot be successfully maintained that, without any mention of, or reference to it, what occurred at it was carried forward into the session of 1900 and written into article 4 *bis* as there adopted without qualification or objection. Upon being ratified by the states participating in the conference, in the form in which it was so cast, it became the treaty law between them, mutually governing their citizens and subjects, to be interpreted according to the terms in which it was couched, unaffected by any reservation or explanatory restriction not expressed in it. A treaty is a contract, and is to be so construed as to carry out the apparent intention of the parties as disclosed by its terms. *Geofroy v. Riggs*, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642. Where the words convey a definite meaning, and there is no contradiction between the different parts of it, the meaning deduced from the face of the instrument is the one to be taken, and courts are not at liberty to add to or detract from it. Or, in other words, the meaning is to be ascertained by the same rules of construction and course of reasoning as are applied to the interpretation of private contracts. 28 Am. & Eng. Ency. Law (2d ed.) 488; *Tucker v. Alexandroff*, 183 U. S. 424, 437, 22 Sup. Ct. 195, 46 L. Ed. 264. With due deference, therefore, to the apparent position to the contrary taken at the first session of the Brussels Conference, it is not to be thought of that a treaty ratified and confirmed by the participating powers in a definite and unambiguous form can be limited or qualified by a resolution passed at a preliminary conference, which is not by reference or otherwise incorporated into or made a part of its terms, so as to be submitted to the different countries called upon to consider and ratify it. Where qualifications are found necessary,

after a treaty has been formulated, if the text is not changed, they are brought in by way of explanatory protocols at the end, as is shown by the treaty of 1883 in question, where a number of them will be found. And this may have been what Mr. Forbes had in mind, when he proposed a special protocol against article 4 *bis* being given a retroactive effect. And, had this course been pursued, it would have removed all difficulty. But unfortunately it was not. And a mere resolution on the minutes of the conference can not be held to take its place.

There is nothing in *Doe v. Braden*, 16 How. 635, 14 L. Ed. 1090, which is counter to this. In that case the treaty with Spain, by which Florida was ceded to the United States, was under consideration; and it appeared that, subsequent to its negotiation and after the terms had been agreed on, the Secretary of State requested and received an admission from the Spanish Minister that certain grants of land by Spain in Florida should be annulled, and this was annexed to the treaty at the time of its ratification and promulgated with it, and it was held that it was as obligatory as if inserted in the treaty itself. "It is too plain for argument," as it is said, "that when one of the parties to a treaty, at the time of its ratification, annexes a written declaration, explaining ambiguous language in the instrument, or adding a new and distinct stipulation, and a treaty is afterwards ratified by the other party with the declaration attached to it, and the ratifications duly exchanged, the declaration thus annexed is a part of the treaty, and as binding and obligatory as if inserted in the body of the instrument." But there is nothing of that kind here. So in *Kinkead v. United States*, 150 U. S. 483, 14 Sup. Ct. 172, 37 L. Ed. 1152, the correspondence between the Secretary of State and the Russian Minister, with respect to the terms of the sixth article of the treaty by which Alaska was taken over was accepted as explaining the meaning of certain expressions in that article, but not, however, to control the scope of it. The case of *New York Indians v. United States*, 170 U. S. 1, 18 Sup. Ct. 531, 42 L. Ed. 927, is much more in point; it being there held that a qualifying provision, passed by the Senate at the time of the confirming of a treaty with certain Indian tribes, compliance with which was made an express condition of the treaty going into force, was of no effect to modify it, as it was promulgated by the President, in which no allusion to the provision was made.

Without further discussion, therefore, it is clear that article 4 *bis*, having been duly ratified by the different states represented in the con-

ference in the form in which it now appears, must be taken as it reads, according to which the dependence of domestic on foreign patents for the same invention, previously granted abroad, is entirely removed and done away with. And this is to be interpreted liberally. As resolved by the Convention of Turin, in September, 1902, a few days after the treaty went into effect in the United States:

The independence of patents proclaimed by the additional act of Brussels ought to be construed in the broadest terms, and particularly in such manner that the term of a patent shall not in any case be dependent upon the term of another patent.

Nor is this to be confined, as conceived by our delegates, to such subsequent incidents as nullities and lapses by reason of the nonpayment of renewal fees or nonworking; an attempt to so limit it having been expressly disapproved by the conference. And, it having been in terms provided that the article should "apply to patents in existence at the time of its being put in force," subsisting patents, including the one in suit, were freed from their previous dependency, equally with those granted afterwards; no saving distinction being made between them:

The article must also be regarded as self-executing. A contrary opinion was given by the Attorney-General as to the treaty of 1883. 19 Opinions, 275. And this was followed by the Patent Office, as the correct construction, afterwards. *Ex parte Zwack & Co.*, 76 O. G. 1855; *Butterworth v. Boral*, 97 O. G. 1596. It was accepted, also, by the Court of Appeals of the District of Columbia in interference proceedings, carried up from the Commissioner of Patents. *Parker v. Appert*, 75 O. G. 1201; *Rousseau v. Brown*, 104 O. G. 1120. In *United Shoe Company v. Duplessis Shoe Company*, 155 Fed. 842, 84 C. C. A. 76, also, it was held by the Court of Appeals of the First Circuit, that, although article 4 *bis* on its face was self-executing, it was controlled by implication by the passage by Congress of Act March 3, 1903, c. 1019, 32 Stat. 1225 (U. S. Comp. St. Supp. 1907, p. 1003), to give effect to it. But neither of these views in my judgment can be sustained. Having respect to their terms, it can not be said that either the treaty of 1883 or the additional Act of 1900 required legislation here to make it effective. They both undertake in the most direct and positive way to say what shall and what shall not be as to the matters with which they deal, and, being ratified in that form, nothing further, by our laws, was necessary to put them into operation. They can not be treated as mere agreements by the high contracting parties to bring the domestic laws of each into

conformity with them by subsequent action. That resulted by virtue of their own force and vigor.

A treaty is a law of the land, as an Act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. *Head Money Cases*, 112 U. S. 580, 598, 5 Sup. Ct. 247, 28 L. Ed. 798. By article 2 of the treaty of 1883, the subjects or citizens of each of the contracting states shall enjoy, in all other states of the union, so far as concerns patents for inventions, etc., the advantages that the respective laws thereof then or shall afterwards accord to their own citizens or subjects, in consequence of which they shall have the same protection as the latter and the same legal recourse against all infringements of their rights, upon condition of complying with the formalities imposed upon citizens or subjects. And by article 3 subjects or citizens of states not forming part of the union, who are domiciled or have [bona fide, according to the additional Act of 1900] industrial or commercial establishments in the territory of one of the states of the union, are assimilated in this respect to actual subjects or citizens. By article 4 any one who shall have regularly deposited an application for a patent of invention, etc., in one of the contracting states shall enjoy, for the purpose of making a deposit in other states and under reserve of the rights of third parties, a right of priority during the periods thereafter mentioned; that is to say, four months in case of designs, and six months (made twelve by article 4 of the additional act) for general inventions. By article 5 the introduction by the patentee into countries where the patent has been granted of articles manufactured in any other of the states of the union shall not entail a forfeiture; subject, however, to the obligation of the patentee to work his patent conformably to the laws of the country. And so on, in practically every article; the same being true, also, of the different articles of the additional act, including article 4 *bis*, by which the independence of foreign and domestic patents is declared and made to apply to those in existence.

It is idle to suggest, in the face of these provisions and others of like character that could be quoted, that the treaty, as well as the additional act by which it was supplemented, was inoperative and lay fallow until Congress, by statute, was moved to give life to it. There is nothing to the contrary in article 17, as argued, which merely refers to the formalities required to ratify, peculiar to each country, such as a confirmation in the United States by the President and Senate. And if there was any doubt therefrom, as to the intention that it should be self-

executing, it is disposed of by article 18, immediately following, where it is provided that the treaty shall go into effect within a month after the exchange of ratifications, and remain in force as to each country until a year after it shall be there denounced. It is to be remembered, also, that the patentee here was a French subject, whose property rights were being thus protected and provided for. It is not as though he were a citizen of the United States, dependent on the domestic law, if that makes any difference. And if the contemporaneous construction given to the treaty by the executive branch of the government, following the opinion of the Attorney-General, is insisted on, what is to be said of the contrary view taken by the French and the Italian governments, which is entitled to equal respect — this being a treaty?

While, then, it would be our duty, if it were possible, having regard to the terms of the treaty, to abstain from giving retroactive effect to it, there is nothing by which it can be so limited; and existing patents must therefore be held to have been unfettered, and enlarged accordingly. The authority to so extend the terms of such patents can not well be doubted. It could have been done by special Act of Congress as to any specific invention, a course that was not infrequently indulged in formerly. 22 Am. & Eng. Ency. Law (2d ed.) 285; 30 Cyc. 918. There was also at one time a general statute by which, upon a proper showing, it could be allowed by the Commissioner. And there was nothing, therefore, to prevent it from being similarly accomplished by an enactment which should apply impartially to all in the same situation, as provided by the treaty. The construction, that the public had a right to have the monopoly brought to an end, in the case of this or any other invention, according to the terms imposed on the patent by the state of the law at the time it was granted, has nothing to stand upon. Congress has the power to revise and extend a patent, even after it has expired and the invention gone into public use. 22 Am. & Eng. Ency. Law (2d ed.) 385. And much more is this admissible as to patents still existing. The policy of the law at present is against the extension of patents, which Act March 2, 1861, c. 88, 12 Stat. 246, expressly prohibited. But that is not controlling; the law-making powers having authority to change their mind upon the subject, if they see fit to do so.

It is said that, if article 4 *bis* is held to be retroactive and self-executing, it revives and reinstates every patent which previous to that time had expired by reason of the limitation imposed by the term of a foreign patent. But that does not necessarily follow. It was only existing

patents that were affected by article 4 *bis*, and not those which had already terminated. Besides that, if this was the purpose, there was nothing, as we have just seen, but the wish of Congress to stand in the way of it.

It is further said, however, that Act March 3, 1903, c. 1019, 32 Stat. 1225 (U. S. Comp. St. Supp. 1907, p. 1003), having been passed for the avowed object of effectuating the provisions of the treaty, Congress, in so undertaking to act, in effect declared against the self-executing character of the treaty, and that the construction so put upon it is to be respected, if, indeed, it is not controlling. This is the view taken in *United Shoe Company v. Duplessis Shoe Company*, 155 Fed. 842, 84 C. C. A. 76, referred to above. But it was recognized in that case that article 4 *bis*, and, if so, the whole treaty, was self-executing on its face, and it is giving altogether too much force to the action of Congress to have it do away with this simply by implication. If the engagement between the high contracting parties, who entered into the treaty, was, by its terms, immediate and unqualified, which is not only demonstrated above, but is there conceded, no legislative declaration afterwards, on the part of one of them, is competent to qualify it. No doubt the treaty could be denounced or superseded by appropriate action; but it is not to be set aside or deprived of its inherent force because of acts based upon the assumed necessity for bringing the statute law into harmony with its provisions.

But it is further said that, the Act of 1903 coming after the treaty and being confined to giving effect to a part only of its provisions, Congress having deemed it advisable to go no further in that direction, the treaty is to that extent abrogated; the act as so passed being inconsistent with it. There can be no question that, as declared in the *Cherokee Tobacco Case*, 11 Wall. 616, 621 (20 L. ed. 227), "a treaty may supersede a prior Act of Congress, and an Act of Congress may supersede a treaty." And so far as this is the necessary result of the act in the present instance, being later than the treaty, this effect must be given to it. The Act of 1903, however, is somewhat peculiar. It is not confined to the purpose expressed in the title, but undertakes to amend, not only section 4887, but sections 4892, 4896, and 4902, also, only the first of which has anything to do with the present subject. And as to section 4887 it simply re-enacts it as amended by Act March 3, 1897, c. 391, § 3, 29 Stat. 692, except that it enlarges the time after which an application for a patent filed abroad shall debar the obtaining of a patent here

for the same invention from seven months to twelve months, this period in the case of designs being fixed at four months; and except, also, that it provides in a new and distinct paragraph that an application filed here within the period so limited, after an application for the same invention filed abroad, shall have the same force and effect as if filed here at the time it was filed there, provided similar privileges are afforded by such foreign country to citizens of the United States by law or treaty; and provided, further, that no patent shall be granted for an invention patented or described in a printed publication in this or any foreign country more than two years before the filing in this country, or which had been in public use or on sale in this country for a like previous period.

But it is difficult to see, upon the most liberal construction, how, as so enacted, it can be given the restrictive effect that is now claimed for it. It is true that it provides for but a small part of that which is covered by the treaty, and if legislation was necessary to give effect to the treaty there would not be much left to it. But that, as we have seen, is not the case. The treaty, if uncontrolled, is self-executing. It is only as Congress in this abbreviated fashion has apparently seen fit to proceed upon a different assumption that any doubt is cast upon it. A repeal by implication is never favored, even between statute and statute; and much more is not a treaty, which has been mutually agreed to, to be overturned by a later statute, which is the individual act of one of the parties. To sustain that view in any case there must be such a clear repugnancy that treaty and statute can not stand together, which, in the present instance, will hardly be contended for. The only inconsistency, as just stated, is that, where one deals with the subject comprehensively, the other does so restrictedly, which is not sufficient; there being nothing to convince that this was the purpose.

It is said that this is shown by the title, which commits the act to the carrying out of the treaty, which must thus be regarded as the only means appropriate for doing so. *Dallemagne v. Moisan*, 197 U. S. 169, 25 Sup. Ct. 422, 49 L. Ed. 709. The title of an act may no doubt be resorted to under proper circumstances, to explain or give character to the body of it. But that it should be allowed controlling force, under the showing that is made here, is entirely unwarranted. Only about one-tenth of the act in question has anything to do with the title; the rest of it, as we have seen, being entirely unrelated, except as it deals with the general subject of patents. And with the little heed that is so paid to it

in the body, it would be straining a point to accord to the title the predominant part that is now urged for it. The title being disposed of, there is nothing in the act itself to in any way disturb us. It did not undertake to undo what had been done by the treaty. At most it merely neglected to take such steps as would have brought the statute law into complete conformity with its provisions. But the treaty was not dependent upon this. It went into effect of its own force some six months before. And it is not to be set aside in any such indirect and inconclusive manner after that. It is also further to be observed that, even if the Act of 1903 is held to have superseded or abrogated the treaty, the treaty having gone into effect in this way meantime, the patent in suit and others similarly situated were thereby freed from their dependency upon corresponding foreign patents, and they could not be put back by the act into their former position, which would offend against the principle of nonretroactivity contended for, even more seriously than anything which is now complained of.

Taking treaty and acts of Congress together, therefore, the case stands this way: By section 4887, Rev. St., a domestic patent for the same invention previously patented abroad was made dependent on the term of such foreign patent, by which it was limited. The Act of March 3, 1897, removed this restriction, but provided (section 8) that it should not apply to patents granted prior to January 1, 1898, nor to applications filed before that on which patents were subsequently granted. This prevented the patent in suit, for the time, from having the benefit of this legislation, having been applied for December 29, 1897, two days within the period fixed by the proviso. Then the additional act of Brussels of 1900 was ratified, by which, according to article 4 *bis*, there was a complete unfettering of foreign and domestic patents for the same invention; and this by express terms was made to apply to existing patents. Such was the state of the law, and such the position of the patent in suit, when the Act of March 3, 1903, came into existence. As just stated, this could not undo what had already been done, nor put back the patent into its former dependent condition. Having become entitled to the full term of seventeen years accorded to patents generally, it could not thereafter be again restricted. Nor did the Act of 1903 indeed, undertake to do so. It simply re-enacted section 4887, as amended by the Act of 1897, leaving out the limitation which time and treaty had doubly disposed of, and introducing certain provisions in conformity with the treaty. It is only by reading into this record that which is not to be found there, and has

no rightful place in it — that the treaty was not retroactive, and was not self-executing, contrary to the plain effect of it — that the patent can be cut down or made dependent again upon the terms of the French patent.

For both reasons, therefore, which were discussed at the argument, the plea interposed in the court below, in my judgment, was bad, and should have been overruled; and the decree sustaining it must be reversed in consequence.

IN RE MITCHELL

District Court for the Southern District of New York, June 30, 1909
171 Federal Reporter, 289

On Application for Admission to Bail Pending Extradition Proceedings.

HAND, District Judge: In this case the petitioner applies for bail under special circumstances. He has been arrested on extradition papers which have been issued from Canada and under which he is charged with what, in the State of New York, would be larceny. A warrant has been issued by Commissioner Alexander, and he is at present in the Tombs prison awaiting the final determination upon his extradition. The warrant was issued against him Thursday, June 24th, which was just upon the eve of a trial in the Supreme Court of the State of New York, in this county, in which he is the plaintiff and the moving parties in the extradition proceedings are the defendants. The trial commenced on the 25th, and I then issued a *habeas corpus ad testificandum*, upon which he appeared in court on the 25th and testified. The suit involves a very large sum of money; indeed, from the papers, I understand that it involves all the fortune of the prisoner. The application is made to enlarge him upon bail for the reason that at present he is entirely unable to consult with his counsel and prepare for the remainder of the trial, which will consume, probably, the 28th, 29th, and 30th days of June. The application is opposed by the Canadian agent with much vigor, who contends that I have not the power to grant bail in such cases. My understanding of *Wright v. Henkel*, 190 U. S. 40, 23 Sup. Ct. 781, 47 L. Ed. 948,¹ is that the existence of the power was distinctly affirmed by the Supreme Court. The court at the same time clearly indicates its

¹ [AMERICAN JOURNAL OF INTERNATIONAL LAW, vol. 1, p. 202.]

judgment that the power should be exercised only in the most pressing circumstances, and when the requirements of justice are absolutely peremptory; but still I can not read that opinion without recognizing that the court understood the power to exist.

The petitioner also relies upon *Pettit v. Walshe*, 194 U. S. 205, 24 Sup. Ct. 657, 48 L. Ed. 938, which construed the proviso of the sundry civil act of 1894 (Act Aug. 18, 1894, c. 301, 28 Stat. 416 [U. S. Comp. St. 1901, p. 717]) as applying to extradition cases. I do not, however, interpret that proviso or the opinion as indicating that the Supreme Court in any sense meant to do more than say that section 5270 of the Revised Statutes (U. S. Comp. St. 1901, p. 3591) was modified *pro tanto* by the sundry civil act, and only to the extent of providing that the extradited person must be brought before the nearest commissioner. We should not interpret that opinion as independently recognizing the right to take bail, but that right must depend entirely upon *Wright v. Henkel*, *supra*. In several cases in this district commissioners and judges have issued bail under similar circumstances, and while I quite agree with the learned counsel for His Majesty's government that the right is a dangerous one, and ought to be exercised with great circumspection, it seems to me that the hardship here upon the imprisoned person is so great as to make peremptory some kind of enlargement at the present time, for the purpose only of free consultation in the conduct of the civil suit upon which his whole fortune depends. Those special circumstances alone move me to allow him to bail, and his enlargement is to be limited strictly to the period of that suit. As soon as that is terminated he must be returned to the Tombs prison to await the determination of the commissioner upon the extradition proceedings. Until, however, that suit is terminated, I will order him released upon bail in the sum of \$3,000. I am also moved to this disposition from the fact that he has long known of these proposed proceedings and has made no effort to avoid them or to escape.

Let an order be entered to that effect.

BOOK REVIEWS¹

L'Avenir De L'Arbitrage International. Par J. M. van Stipriaan Luiscius, Docteur en Droit, Avocat a La Haye. Published at Brussels and Paris, 1907.

This is a work of 105 pages, the first 46 of which are devoted to advocating a convention to complete the pacific regulation of international conflicts.

The proposed convention is then submitted in 166 articles, mainly very brief and clearly expressed, and, while bold and simple in their provisions, in some respects highly novel.

The work closes with some 19 pages, mainly an earnest and sometimes impassioned appeal for publicity and discussion as to this proposal, in order that its merit may become known, its adoption by the nations of the earth assured, and the great good of substituting arbitration and peaceful negotiation and adjustment for war in international disputes be accomplished.

The author is most hopeful as to these results and as to the merits of his scheme.

The proposition, while leaving the utmost freedom to arbitration, in the first instance, provides for a court of appeal in matters of international arbitration in which each signatory power designates a member.

This court is divided into two chambers, one for questions of public and the other of private international law.

The court is to be permanent and to assemble on days fixed annually in advance.

Its procedure and pleadings are provided for.

The members of the court choose a president and a vice-president annually.

The language used before and by the court shall be French, English or German, and any state using any other must have it translated into one of them and the president and vice-president must speak, understand and write these three languages.

It is curious to compare this requirement with William Penn's scheme for a European Diet. He provided that in the session of his sovereign estates the language spoken must be either Latin or French, saying "the

¹ The JOURNAL assumes no responsibility for the views expressed in signed Book Reviews. — J. B. S.

first would be very well for civilians, but the latter more easy for men of quality."

The conventions we are considering provide that the court shall sit at The Hague and its members reside there.

Judgments shall be given in all three languages mentioned above.

The court having twice given the same decision can not in twenty years give a different decision in like case.

At the age of 70 the judges shall retire with pensions equal to their salaries, which are 50,000 francs per year and for the vice-president 65,000 and the president 100,000 francs.

The court may act as a court of first instance if parties so agree.

The court and its entire entourage is declared neutral and "*Le signe de la neutralité * * * est une balance blanche sur un fond bleu.*"

The president shall have the title of ambassador, the vice-president of envoy extraordinary and minister plenipotentiary and the members of the court that of minister resident and they may not accept decorations.

They must abstain from all other salaried functions.

The "jurisprudence" of this court is based on international law found in treaties and expounded by the writers.

The judges must at first compose digests or pandects of such law.

The court may function as a court of law, after an international inquiry, to apply the results to the difference according to the law of nations.

It may function as a contriving (*projetante*) court to devise treaties to end differences.

And still further as a contriving court of appeal, if necessary.

There is some slight suggestion of the *Bureaux de Conciliation* in the project of the Abbe St. Pierre in this and it recalls Sir Edmund Hornby's proposition by which the Tribunal of Arbitration could arrange a *modus vivendi* between the disputants pending a decision. The author advocates such powers on the theory that many disputes arise from conflict of interest and not from conflict of rights.

This difficulty was discussed by the writer of this review before the International Law Association of London in 1907 and its solution through expropriation by arbitration was considered. (See Harvard Law Review, Vol. 21, page 23.)

The proposed tribunal may function as a court of complaints to hear complaints of injustice between nations and determine whether or not there has been such and, again, may act as a court of appeal as to such complaints.

It may act as a court of mediation with military advisers.

The convention devotes six of its largest sections to the fundamentals of the law as to states. In these it recognizes the freedom, equality and permanence of states and the freedom of the sea more than two geographic miles from the coast. It provides that matters of extradition may be appealed to the international court. It abolishes retorsion, embargo and peaceful blockade and forbids offensive alliances.

The court may function as a criminal court and may declare a war unjust, the carrying on of such a war being the sole crime it is to try, and may require all nations to compel their subjects to put an end to all relations or intercourse with the offending nation or its people under penalty of being punished as for high treason.

The court may function as a court of neutrals in which neutral nations have a right to oppose a war or treaty as prejudicial to their rights and then a judgment in their favor is enforced as in case of an unjust war.

Nine sections are devoted to the enforcement of judgments. They provide that if, after hearing a decision rendered, a party is not complying with a judgment, after due delay, all signatory powers must cease treaty relations with the offending power, and judgment for damage and costs may be also given.

The last six sections of the convention provide for the intervention of the president of the court in certain cases.

The provisions of the convention are sustained by arguments based on considerations of justice and humanity.

There is substantially no historical argument, although a comparison would be interesting with many earlier projects and especially that of Henry the Fourth, so-called, as elaborated by the Abbé de St. Pierre where the states were to form a union and no one to make war except against him who shall be declared an enemy to the European Society.

The arguments advanced in the publication under review are mainly the horrors of war (which are confessed), the injustice of the triumph of mere force, the desirability of peace with justice, all of which again must be confessed.

The argument is sustained mainly by a series of carefully balanced, antithetical, epigrammatic truisms. A claim for a world-wide hearing is based on the desirability of the result to be attained. The doctrine of altruism is most constantly advanced as that which should control.

The author, an advocate from one of the lesser states, urges them to combine and to check the assumption of superior rights by the great powers.

The author is an advocate at The Hague and he would institute a great international court of appeal which should sit permanently in his own city, whose judges should there reside. He would vest this court with not merely judicial powers but with a controlling supervision over diplomatic negotiations and military operations, over treaties and over wars. He would invest the heads of this tribunal with permanent rank and station and reward them with great salaries. He would require certain linguistic accomplishments of them and he lets us know that he himself possesses these linguistic accomplishments. One can not object to the humanity of his appeal, or the desirability of his objects. His indictment of the state of armed peace where the burdens of war are made permanent instead of temporary, a state toward which this nation, in the opinion of some, is now progressing, is perhaps, the most convincing and vigorous part of his argument. The practicability of his scheme of almost universal dominion at The Hague seems by no means apparent and it is not probable that the nations of the earth will so far surrender autonomy as he suggests.

It ought to be added that the jury *du concours Narcisse-Thibault* organized by the International Bureau of Peace at Berne, has awarded to this memoir an honorable mention and a medal.

Many voices, many pens, many minds laboring for international justice and international peace aid in achieving those great consummations. Those who labor deserve our gratitude even when we can not wholly accede to their suggestions.

CHARLES NOBLE GREGORY.

La frode alla legge e la questione dei divorzi fra Italiani naturalizzati all'estero. G. Ottolenghi. Turin: Unione Tipografico-Editrice Torinese, 1909. L. 5.

We have in this study of Mr. Ottolenghi on "Fraud against the law and the question of divorces between Italians naturalized in a foreign country," an exceedingly favorable specimen of its class. It is, of course, quite possible to differ with the opinions expressed, and it is conceivable that the arguments adduced might be subjected to destructive criticism by the partisans of other theories, but we are left in no doubt as to what views the author maintains, the presentation is clear and logical, and the point at issue is never lost sight of. This is partly owing, no doubt, to the fact that the question raised is a concrete and practical one, demand-

ing a concrete and practical answer, but one may be permitted to think that there is also evidenced a certain admirable and welcome quality of mind.

The circumstances which give rise to this study are as follows: Divorce is forbidden under the laws of Italy. Expatriation and naturalization are freely permitted. It has become more or less common for husband and wife desiring to obtain a divorce, to seek naturalization in a foreign country where divorce is allowed, carry through the necessary proceedings there, and then resume the original domicile, and perhaps the original citizenship in Italy. As the object of such a proceeding is ordinarily to make possible a new marriage, serious questions affecting both status and property are likely to present themselves.

There has been a strong inclination to regard these divorces as fraudulent and to refuse them recognition in Italy. It is to be observed, however, that as the question is put, there is no suggestion of fraud as against either of the parties, or even against the courts which grant the divorce; the so-called fraud is purely and simply against the law of Italy; permitted and legal means are used to attain an end which could not be directly reached in a legal manner.

The general conception of fraud against the law is, therefore, first subjected to analysis. It would seem that there is an element of metaphor or personification in the use of the term at all. However, the author concludes that there is in fact no radical distinction between acts in fraud of the law and acts against the law. We can not by any safe or permissible system of construction look beyond the terms of the law itself to discover the evils at which it is aimed or the acts which it forbids. To seek to extend the scope of a legal prohibition beyond what can be drawn from its terms by a rational interpretation, is to trespass on the field of ethics or of legislation, and leads the way to all confusion.

Fraud on the law is, therefore, simply the commission of an act prohibited by law, by methods which are in themselves legal or wear an appearance of legality. The question always is, is the end achieved itself prohibited, or is it merely the act when done in some particular way or by some particular method?

In cases arising under international law the method employed is, of course, the subjection of the illegal act to another system of law under which it becomes legal.

Cases where the means employed consist in a mere change of domicile have this special feature, that intention is always an essential element in

domicil; hence, if it appears that there never was a *bona fide* intention to maintain the domicil there is a fatal vice in the original acquisition, and the fraud perpetrated by this means becomes ineffective. The acquisition of a new nationality, however, stands upon a different basis; it involves an act of sovereignty on the part of the state which can not be arbitrarily treated as a nullity by the state of origin, even should it appear that there was an element of fraud in the conditions under which it was obtained, always excepting the case where the conditions prescribed by the state of origin for the forfeiture or renunciation of original allegiance have not been complied with.

Apart from the obligation to perform military service it does not appear that the law of Italy imposes any special conditions on the renunciation of allegiance, and the supposition is that the acquisition of the new nationality is regular and valid on its face. Can the fact that it was acquired for the purpose of escaping the effects of Italian law vitiate the transaction? Mr. Ottolenghi thinks not; nor does he favor the alternative theory whereby the naturalization is to be regarded as valid, but does not produce all its ordinary effects inasmuch as the intention of the parties was not to acquire a new nationality *simpliciter*, but merely for certain purposes. Intention has, in fact, no bearing on the results that flow from naturalization, nor would it be either logical or practicable to create an intermediate status in which different national laws would be applied to different acts of the same person.

An obvious difficulty in applying the idea of fraud to the proceeding in question is in the determination of the moment at which the fraud may be held to have been consummated, and on this we find a variety of opinions. If, as seems to be the case, it can not be definitely placed in the proceedings for naturalization, it is even less easy to find it in the action for divorce, or even in the application for confirmation or execution of the foreign judgment in Italy. Nor does the writer think that execution can properly be refused on the ground of "public policy;" every step in the transaction is in strict conformity with law, and the policy of the state can hardly in this instance be held to suffer from the relations of foreign citizens.

As a matter of fact, the fraud, if there is one, arises at no one instant of the proceeding, but exists essentially in the intention of the parties; and, as the author asks, "How shall we bring suit against an intention?" Perhaps the answer might be that it is perfectly admissible where the fraud has been committed against a law. And here we have really an

indication of the gist of the difficulty, in the personification that is at the bottom of the whole conception.

The Hague convention dealt with certain aspects of the matter, and among others, formulated the rule that a fact which occurred before the change of citizenship shall not be invoked as a cause of divorce in the courts of the new country. Mr. Ottolenghi concludes from an examination of the rules as formulated and of the discussions and proposals that preceded them, that setting aside any question as to the validity of the change of nationality, the claim that recognition of the foreign judgment could be refused on the ground of "public order" and by reason of the immoral intention of the parties, even if admissible before the convention, has ceased to be tenable.

The conclusion, then, is that a divorce procured abroad by former citizens of Italy who have changed their nationality temporarily and with a view to returning to Italy when their purpose is accomplished, is perfectly legal, and must be recognized in the Italian courts in all its effects and implications. There is, however, undoubtedly a grievance in this state of affairs. The established policy of the national law is set at naught while the parties continue to enjoy all the privileges of life in their native country. What is the remedy? Mr. Ottolenghi suggests that it is to be found in the undoubted right of the state to refuse naturalization, and even to use the power of expulsion as against foreign subjects residing in Italy. The contempt manifested for Italian law can in this manner be penalized, if its direct results can not be avoided.

JAMES BARCLAY.

The Promise of American Life. By Herbert Croly. New York: The Macmillan Company. 1909. pp. viii, 468.

Mr. Croly at the outset of his work announces that the loyal American must be prepared to sacrifice the traditional American ways of realizing the national vision; and that the promise of American life in its noblest form is to be fulfilled "not by sanguine anticipations, not by a conservative imitation of past achievements, but by laborious, single-minded, clear-sighted, and fearless work." With fairness of mind the writer examines conditions that in the past have encouraged generous and irresponsible optimism. He utters a timely warning against the consequences of the popular expectation that "familiar benefits will continue to accumulate automatically." He urges the necessity of wide-spread appreciation of obstacles to be overcome.

The author draws a vivid picture of the political ideas of the Federalists and the Republicans respectively, observing the fallacies that weakened the views of Hamilton, as well as of Jefferson. He carries his examinations further, and accurately reviews the political ideas dominating the Democrats and the Whigs. Throughout the historical sketch the writer has endeavored to point out the relation of American nationality to political parties, principles, and individuals. In his treatment of the life and services of Lincoln the author is most happy. He comments on the fact that Lincoln was the first responsible statesman who proclaimed that American nationality was a living principle rather than a legal bond.

In examining contemporaneous political and industrial problems the writer deals severely with the American lawyer, commenting upon the fact that American government is managed through the instrumentality of the Bar. The writer believes the qualifications of the lawyer for the task he undertakes are no longer substantially such as they once were. He declares: "Not only has the average lawyer become a less representative citizen, but a strictly legal training has become a less desirable preparation for the candid consideration of contemporary political problems." The writer further declares that the bulk of American legal opinion is opposed to reform which tends to political or economic reorganization; and, further, that at a time when the basis of the American legal system needs a candid consideration, American lawyers "have either opposed or contributed little to the essential work, and in adopting this course they have betrayed the interests of their more profitable clients — the large corporations themselves — whose one chance of perpetuation depends upon political and legal reconstruction."

The chief object of Mr. Croly's book is to show that the fulfilment of the Promise of American Life depends upon the fulfilment of American nationality as he has defined that term. He makes an interesting comparison of the situation in England, Germany, and France, respectively, giving in each case a vivid picture of the relation between nationality and democracy. In view of the present political crisis in England, the comment of the author that "the commoners on their side are proud of their lords and of the monarchy and grant them full confidence," may be questioned, at least by the adherents of the Liberal Party.

To students of international law in the United States one of the most interesting portions of Mr. Croly's book is that relating to American Foreign Policy. The author denies that the Monroe Doctrine has "a

status in the accepted system of international law." He adds that with the exception of Great Britain no other European country has accepted it, and that a number of them "have expressly stated that it entails consequences against which they might sometime be obliged strenuously and forcibly to protest." In the judgment of the reviewer it is a significant fact that at the present time European powers, before attempting, for whatever reason, coercive measures against delinquent American states, are disposed to consult the United States. It will be remembered that, for example, on December 11, 1901, the Imperial German Embassy filed with the Department of State a Promemoria with reference to proceedings about to be taken by Germany against Venezuela; and also that in 1908, the Government of the Netherlands consulted the United States with reference to measures to be undertaken against the same state. If civilized maritime states habitually conform to particular rules of conduct with respect to the American Continents, those rules will ultimately become incorporated into international law, even though their origin is due to the declarations of a single state, and their observance to its influence and naval power. Mr. Croly believes that there is a dangerously aggressive tendency of the Monroe Doctrine not due to the fact that it derives its standing from the effective military power of the United States, but because the policy which it fosters carries isolation to a degree that may provoke justifiable attempts to break it down.

With reference to an American international system Mr. Croly declares that the first object of the policy of the United States should be to place its relations with Canada on a better footing. To that end he suggests a closer political situation between the two countries — "some political recognition of the fact that the real interest of Canadian foreign affairs coincide with the interests of the United States rather than with the interests of Great Britain." A fanciful suggestion for a Canadian-American treaty is made, the essential idea of which deserves consideration. The writer is firmly convinced that the systematic effort to establish a peaceful American system is just as inevitable a consequence of the democratic national principle, as is the effort to make our domestic institutions contribute to the work of individual amelioration.

The general conclusions of the author are interesting and valuable, particularly with reference to the position and duty of the individual citizen in the process of the fulfilment of the Promise of American Life. He pleads for individual emancipation from the traditional American viewpoint. Finally, in order to attain the realization of American

nationality, the author emphasizes the overwhelming necessity of individual effort to accomplish individual emancipation by the doing of special work with ability, energy, disinterestedness and excellence. Whether or not the common citizen become emancipated, by the excellence and distinction of his work, and by contributing his part towards the fulfilment of the Promise of American Life, depends primarily, according to the author, upon the ability of his fellow-countrymen to offer him acceptable examples.

In the judgment of the reviewer Mr. Croly has written a book which deserves wide reading. If it is widely read it is believed that its influence will be profound. By the excellence of his own work, by the fairness of a mind which he has applied to the American problem of largest consequence, Mr. Croly has forged and tempered an instrument not only for his own individual benefit, but also quite as much for that of American society.

CHARLES CHENEY HYDE.

A Vindication of Warren Hastings. By G. W. Hastings. London: Henry Frowde. 1909. pp. vi, 203.

The historical night that shrouds English activity in India during the 18th century was not cleared by James Mill, who unqualifiedly accepted the slanderous attacks of Francis and his partisans on Warren Hastings. Mill wrote the slanders into his history, where being found by Macaulay, they appeared in his brilliant essay, as facts. Many who have read that scintillating essay have gained from it their entire historical knowledge of Hastings, and it left a wide-spread impression that his domestic administration of India was marked by personal selfishness and corruption, and that his foreign policy was dictatorial, unscrupulous and conducted with an unnecessary harshness towards the native rulers. It has perhaps been difficult for the American mind to differentiate the coloring from the facts in regard to the rule of the East India Company in India under Hastings, for though viciously opposed by a majority of his Council, Francis, Clavering and Monson, he nevertheless dominated India during the critical epoch in which the American Colonies, after protesting against a vicious system of taxation, finally threw off the yoke of the mother country. It is easy to believe that the arbitrary and unwise actions of Royal Governors and other officials in the American Colonies were part and parcel of a policy by which the England of that day ruled in all of her outlying possessions. There is an undoubted basis for the

belief that the early activity of the East India Company in India was animated by self-interest, that in Clive's time the country was fleeced by English officials from Clive himself downward, and that native officials employed by the Company did not hesitate to batten off their fellow countrymen. No monopoly such as the Company could, or ever did, govern wholly in the interest of the people. The Court of Directors at London had to pay dividends — which meant that Clive and Hastings had to make India pay. They did, but Clive by methods that were deplorable, Hastings by an efficient and honest reform of the administration. England laid the foundations of her Oriental Empire through the activity of a monopolistic trading Company. Such was the general policy during the 17th and 18th centuries. The system was undoubtedly bad, but Hastings was the agent only of the East India Company, not its creator. The point is, did he as an agent of an approved method of government of his day, animate his administration by ideas so broad and sound that they would be approved and retained when the monopoly was replaced by a direct governmental control acting through an efficient civil service? Undoubtedly he did, although he committed a great error of judgment in fixing the opium monopoly into the Indian system of revenue.

Lord Clive made the military conquest of Britain's Indian Empire, but he was no great administrator. When he left India for the third and last time, in 1767, the territorial foundations of the British Empire in Bengal were safe; but the dual system of government which he established, was conducted by English chiefs and native underlings whose corruption and rapaciousness were unparalleled. In 1772, Warren Hastings fell heir to this system, and it needed his commanding administrative genius to reorganize the Government of Bengal and the rest of British India, so that it remains to this day the foundation of the British Indian Government. Hastings had proved himself in minor positions and as a junior member of the Council, a faithful servant of the East India Company; intelligent and honorable, he had an intimate knowledge of Indian manners and customs. When he was appointed to the Governorship of Bengal, in 1772, and as first Governor General in 1774, it was his desire, as well as his express duty under a predetermined policy of the Court of Directors at London, to bring administrative order out of chaos, and to put a stop to the intrigues and continuous quarrels of the independent rulers in India. The later researches of Sir William Hunter, from whom I am freely quoting, G. W. Forrest, Strachey, and Sir James Fitzjames

Stephens have cleared up any doubts as to the personal integrity of Hastings, and there is now in this vindication by G. W. Hastings a final answer to his critics.

The more recent and thorough knowledge of the original manuscripts of the Company show that for the thirteen years — 1772–85 — during which Hastings governed for the East India Company, he brought to bear on Indian problems an indomitable application and patient statesmanship that is unparalleled in oriental administration. Although his foreign policy has been most widely discussed and criticized, his true fame undoubtedly rests upon his administrative capacity. Under the dual system of government established by Clive in 1765, a substance of territorial power was obtained by the East India Company under the guise of a grant from the Mogul Empire. Several Indian provinces which had been overrun by Clive, were handed over to the Mogul Emperor, who in turn granted the Company the fiscal administration of Bengal, Bahar, Orissa and the Northern Circars of Madras. Under this system, the English received the revenues of Bengal, and on their part engaged to maintain an army. Criminal jurisdiction was left in the hands of the Nawab Wazir, to whom the Government of Bengal had been sold. The weakest point in this dual administration was that the actual collection of the revenues was left in the hands of rapacious native officials.

Hastings rapidly changed all this. He created Courts of Justice, placed the collection of the revenue in the hands of English officials, known to-day as Collectors, purged the revenue service of corruption, and laid the foundations for an organized system of police. The paltry salaries of officials were increased, and the common corruption which tainted civil and military life under Clive was practically destroyed. His foreign policy was bold, and it is difficult at times not to regard it as severe; but if he had not protected the Company's territory from the scheming and unscrupulous native Princes, he would have been annihilated. He had to destroy them, or he would have been destroyed. In all of his great work he was handicapped by a statute of Parliament known as the Regulating Act of 1773. Under this Act he became the first Governor General presiding over a Council, the Members of which, like himself, were governed by the terms of the Act. Like every other Member of the Council he had but one vote, except in the case of an equal division, when he had a casting vote. Had his Council cordially co-operated with him, it would have been a heavy task to put the East

India Company's possessions on a sound economic basis. With a majority of his Council, Francis, Monson and Clavering, hostile to him, using its strength rabidly and bitterly, it is a wonder that he accomplished anything. One great error of judgment he certainly committed, namely the assumption of the Mogul opium monopoly, but this most singularly with the unanimous approval of his Council. This action was all the more deplorable in view of Hastings' statement in discussing the question as to whether the opium trade should be free or taken over by the Company. He "urged that it was undesirable to increase the production of any article not necessary to life, that opium was 'not a necessary of life, but a pernicious article of luxury which ought not to be permitted but for the purpose of foreign commerce only, and which the wisdom of Government should carefully restrain from internal consumption.'" Hastings' ethical discrimination is the foundation on which rests the deplorable Indo-Chinese opium trade. It is impossible to vindicate Hastings' ethics in this matter. But the six main charges brought against him in his impeachment and by Macaulay, are effectively disposed of by Mr. G. W. Hastings in his vindication. The author writes with a confidence based on a study of the actual records, and with a touch of affection and admiration for a remote relative that does not detract from the value of his work.

The author takes up the six leading charges brought against Hastings at one time or another. One of them is not pressed as a crime by Macaulay, though strongly condemned. It will suffice to state the author's conclusions in regard to the first and second, namely, the Rohilla War, and the trial and execution of Nuncoomar.

The Rohilla War, as represented by Macaulay, was an unscrupulous device employed by Hastings to obtain money for the Company; as a bargain which he drove with Sujah-ul-Dowla, the Vizier of Oude, to lend him English troops for the conquest of Rohilcund and the extirpation of the Rohilla tribes, in consideration of the sum of four hundred thousand pounds paid by the Vizier. The real facts are that the Rohillas brought on the war by their own perfidious and dangerous conduct. Their territory was invaded by the Mahrattas. Help was given from Calcutta and Oude, and the invaders were driven off. The Rohillas covenanted in a treaty witnessed and countersigned by the English Commander to pay the Vizier the sum of forty lacs. Not a roupee was paid, and it was found that they were secretly intriguing with the Mahrattas in order to evade the covenant. This perfidy gave the Vizier a just provocation to

war, and Hastings a valid reason for assisting his ally. After a long and anxious consideration of the facts, the Council, with Hastings at its head, resolved to assist the Vizier, and ordered a brigade to advance into his possession, Oude, for that purpose. The Rohilla power, which had been usurped some sixty years before, was broken by one sharp conflict. Eyewitnesses have contradicted the atrocities so luridly described in the Essay, and Mr. Hastings declares that they may be dismissed as gross exaggerations and malicious inventions. He quotes from Mr. Forrest that "About seventeen or eighteen hundred Rohillas with their families were expelled from Rohilcund, and the Hindu inhabitants, amounting to about seven hundred thousand, remained in possession of their patrimonial acres and were seen cultivating their fields in peace." These facts are placed against the rhetorical account given by Macaulay.

The glowing words in which Macaulay pictures the supposed vindictiveness of Hastings in the Nuncoomar affair have perhaps sunk most deeply. What an opportunity for a master of language? The glamor of India, and moving in it, as a central figure, a high priest of the order of Brahma hanged for forgery. Macaulay drives it into his readers that the end of Nuncoomar was brought about by the machinations of Hastings. The Rajah Nuncoomar was unquestionably an able man, and his influence in the Hindoo community was weighty and wide-spread. Considering the reverence in which the higher Brahmin is held by the Hindoos in general, it needed no great effort on the part of Macaulay to arouse a wide-spread sympathy for him in England. In distorting the facts to make a literary holiday, he wrote blindly if brilliantly. Yet it should be pointed out that Macaulay knew of Nuncoomar's character. He wrote of him as "That bad man, stimulated at once by malignity, avarice and ambition," and that tried even by the low standard of Hindoo morality, he was a discredited personage. Hastings and Nuncoomar had had friction since 1859. A change in the Government of India gave Nuncoomar an opportunity to display his vindictiveness by appearing as the accuser of Warren Hastings. Shortly after the close of the Rohilla War the Regulating Act mentioned above came into force. As the Governor of Bengal for three years Hastings had been supreme. Under the Regulating Act the administration of public affairs was entrusted to a new body, a Council composed of a Governor General — Hastings — and four others. Mr. Barwell, an old and experienced official of the Company, and at this time a friend of Hastings, became a Member of the Council. Clavering, Monson and Francis, who had never seen India,

and who seem to have been not well acquainted with it by any other means, were sent out from England to complete the Council. Immediately on their arrival, these three joined forces in opposition to Hastings. The Rohilla War, just ended, was denounced as impolitic and unjust. Hastings' private correspondence with the English resident at Oude was demanded. It was refused. The three assailants instituted an inquiry into the manner in which the war had been conducted, with the object of bringing the Governor General into disrepute. Their ultimate object seems to have been to supplant the Governor General, and by driving him from India obtain a reversion of the office for one of themselves. Hastings' public policy had been sustained by the Court of Directors. It was necessary to attack his personal integrity, if the conspirators were to succeed. They found Nuncoomar at hand, a willing and ready weapon for their purpose. On the 11th of March, 1775, Francis precipitated the affair in the Council by stating that he had that morning received a visit from Nuncoomar who had delivered to him a letter addressed to the Governor General in Council, and demanded that it should be laid before the Board. It was apparently known to Francis and Monson that the letter contained serious charges against the personal integrity of Hastings, the principal being that Hastings had in 1772 received the sum of three lacs and fifty-four thousand rupees from Nuncoomar, and the Munny Begum. Of this letter Lord Thurlow truly said that "A more extraordinary or more insolent production never appeared, nor one which carried falsehood on the face of it more strongly." On the 13th of March, a second letter from Nuncoomar to the Board was received and read. In it he reiterated his previous statements, and declared that he had "the strongest written vouchers to produce in support," and asked leave to appear before the Council to establish his accusations against Hastings "by an additional incontestable evidence." Monson immediately moved. "That Rajah Nuncoomar be called before the Board." Thus the three partisans would have had their Chief sitting in Council openly accused as a criminal. This was too much for Hastings' sense of justice and propriety. With that vigor which characterized him in a crisis, he at once wrote a minute declaring that he would not suffer Nuncoomar to appear before the Board as his accuser. He knew what belonged to the dignity and character of his administration. He would not sit at the Board in the character of a criminal, nor acknowledge the Members of the Board as his judges. He declared that he looked upon Clavering, Monson and Francis as his accusers, though

he could not press this assertion in the direct letter of the law. But he had his reasons for his attitude. He ended by stating his inflexible determination not to suffer the indignity of allowing Nuncoomar to appear as his accuser before the Council. "The Chief of this Administration, your superior gentleman, appointed by the Legislature itself, shall I sit at this Board to be arraigned in the presence of a wretch whom you all know to be one of the basest of mankind? Shall I sit to hear men collected from the dregs of the people give evidence at his dictation against my character and conduct? I will not. You may, if you please, form yourselves into a committee for the investigation of these matters in any manner which you may think proper, but I repeat that I will not meet Nuncoomar at this Board, nor suffer Nuncoomar to be examined at the Board, nor have you a right to it, nor can it serve any other purpose than that of vilifying and insulting me." A dramatic moment. It would have been interesting to have observed it. In spite of Hastings' protest, the majority carried the resolution that Nuncoomar be called before the Board. Hastings declared the Council dissolved, and protested that anything done in his absence would be unwarranted and illegal. Barwell accompanied him as he left the room. The partisans now had what they desired. Clavering was sent to the Chair by his colleagues, and Nuncoomar was called to state his grievances.

But one must hark back a few years. In 1772 a suit had been instituted against Nuncoomar for more than a lac of rupees, said to have been due to the estate of a banker. Brought before the court, it was recommended that the case be arbitrated. Nuncoomar at first refused to accede to this proposition. However, he finally consented; but a dispute arose as to the arbitration. The case hung fire for some six years, when the whole legal and judicial state of affairs was changed by the arrival at Calcutta of the Supreme Court of Judicature created by statute. Owing to some technical difficulties it was found impossible to get the original papers, without which the forgery could not be established. But finally a Mr. Farrar, who had been admitted as an advocate of the Supreme Court, moved the Court for the papers in the forgery case. This motion was made *six weeks before* Nuncoomar's accusation of Hastings, produced before the Council by Francis. The main allegation of the accusers of Hastings was to the effect that Hastings having now been accused by Nuncoomar before the Council of taking bribes and other peculation, suborned the prosecution of his accuser on a charge of forgery, the transaction out of which the charge arose having taken place *six*

years before; that Nuncoomar was under this accusation brought to trial before Sir Elijah Impey, the Chief Justice, who was described as in collusion with the Governor General, arraigned before an English jury, found guilty, sentenced to death and hanged — all this being brought about by Warren Hastings to silence a dangerous enemy. Sir James Stephen, a Judge of the English High Court of Justice, looked into the history of this case many years ago, and he has proved conclusively in his *Story of Nuncoomar* that Hastings was innocent of the conduct attributed to him. It was proved beyond a doubt that the proceedings which led to the arrest and trial of Nuncoomar were, as stated above, commenced six weeks before he had made any charge against Hastings, who could have had, therefore, no interest in the matter. There can be no doubt that Hastings' solemn declaration on oath before the Supreme Court that he had neither advised nor encouraged the prosecution of Nuncoomar, and that it would have been unbecoming the First Magistrate in the Settlement to have employed his influence either to promote or dissuade it, is the simple truth. Macaulay has said that none but "idiots and biographers" could accept his view of the affair. But it looks now as though the "idiots and biographers" were right, and that the brilliant essayist who would not stoop to verify, was wrong. Macaulay overlooked another important fact. He declares that the trial of Nuncoomar was before Impey and a jury composed of Englishmen. This statement is in itself sufficient proof that he had never read the report of the trial. As a matter of fact Nuncoomar was tried before a Bench of four judges, and the jury was composed of European inhabitants of Calcutta — not all English, some of whom had been resident therein, and some born there. A verdict of guilty was finally returned against Nuncoomar, and he was sentenced to death. The author of the vindication frankly recognizes that the sentence of death was too severe. The assertion is that when Nuncoomar mounted the scaffold he well deserved his fate, considering the meanness and criminality of the last forty years of his life. But English justice does not recognize the idea that a man should be hanged because his character and history may show that he deserves it. He can be hanged for nothing but for the crime for which he has been convicted. Though Nuncoomar's trial was fair, the verdict just upon the facts proved, and the sentence legal under the statute, it cannot be denied that the enforcement of a capital sentence under a statute passed to apply to England in accordance with English views, on a native of Bengal, was excessive. After sentence there should have

been a respite to ascertain the pleasure of the Crown. But Sir Elijah Impey, an ordinary English lawyer with no wide views, insisted on the strict letter of the law.

Speaking generally of Warren Hastings' career in India, the author of the vindication claims to have written with careful candor, and with no other object than that of stating the real facts. He believes that all the real facts will stand the test of impartial inquiry. He submits that in no case can any proof of any crime be established against his client, but he recognizes that human nature is not absent from the history of Warren Hastings, that he is the last to suppose that in all of Hastings' transactions there was no error, no fault in design, no imperfection as to detail. Shortcomings there were, frailty perhaps, but these do not suggest crime unless one is to expel moral justice from a consideration of public acts. It is this want of moral justice which condemns Macaulay for the repeated assumptions of guilt in his estimate of Warren Hastings' character and services. The vindication deserves a popular audience, for it gathers into readable compass the three folio volumes of G. W. Forrest, in which are contained the daily minutes of the Council during Hastings' administration, and on which our new knowledge of Warren Hastings is largely based.

HAMILTON WRIGHT.

Principi di Diritto Internazionale: Parte Prima — Diritto internazionale Pubblico. Giulio Diena. Naples: Luigi Pierro, Publisher. 1908. Price L. 6.

This very admirable hand-book of the Principles of Public International Law is one of a series of Manuals on legal and sociological subjects issued by the same publisher. Professor Diena proposes in a later volume to cover the field of Private International Law, emphatically asserting, however, that this course, adopted from motives of convenience, in no way signifies acquiescence in the theory that denies the intimate relationship of the two branches of the subject.

The present volume after dealing with the conception and the fundamental notions of the science, and briefly sketching its historical development, takes up in order its subjects, viz: the states and their rights; its objects — territory, sea and rivers, as well as individuals in their relations to penal and administrative international law; its instruments, including the executive authority of the state, diplomatic and consular officers; the acts of the state, out of which diplomatic obligations and

responsibilities arise; and finally, procedure and methods in peace and war.

The arrangement of the matter is logical, the treatment of the topics is, as a rule, clarity itself. The work is specifically designed as a handbook, and the citation of cases and of historical precedents is properly confined within narrow limits, and employed rather as a means of making clear and impressing the meaning of the principles stated than for the purpose of furnishing exhaustive references and authorities. Professor Diena does not fail to indicate the existence of differing opinions in cases where the rules to be deduced from the facts are still in dispute, but from the necessity of the case controverted matters are argued and disposed of in a somewhat summary way.

The author openly declares himself at the outset an eclectic, unwilling either to base his science exclusively on purely philosophical and theoretical principles, or to accept the limitations of the positive method which claims to confine itself to the verification of existing facts and established rules. The rules that can be deduced from actual practice are to be checked by scientific principle, completed where insufficient, corrected where imperfect or antiquated, always preserving the distinction between positive and established law and principles founded on a rational or scientific basis. It may fairly be said that he preserves the balance, and errs neither in the direction of a loose idealism nor of mere adherence to precedent.

His view of the basis of International Law is fundamentally that of a community of nations possessed of common customs and ideals. It is the joint and reciprocal will of the several states that raises principles of natural right or of legal science to the status of rules of international law. It is in fact, though not in the crude sense, a theory of social compact.

In this view of it International Law is above all a progressive science, and an index of the advance of civilization. There are many instances where it becomes a duty to criticise the practice hitherto adopted but which is at variance with the great principles openly professed or tacitly admitted by all. There are other cases where practice differs, where special interests have led one nation or another into questionable positions, and there is room to condemn or to approve. In all such cases we may trust to find Professor Diena moderate in his statements, but progressive and sane in his views.

There are questions raised and discussed which hardly lend themselves to the summary treatment possible, such for example, as the right of forcible annexation, or the right to a plebiscite on the part of the population of a territory about to be transferred. On the latter head particularly, the very forcible practical objections alleged do not satisfy the mind on the subject, because the moral argument (valid or not) against transferring men as if they were chattels from one allegiance to another, has not been radically discussed. And thus the whole outcome of these matters is left in something of a haze.

It is quite otherwise when the author comes to treat of more specific questions, as for example, the treatment of the inhabitants of a region occupied by the enemy's troops, or the Monroe Doctrine. On this last subject we are not surprised to find him taking a rather unsympathetic attitude. Originally, as a particular application of the doctrine of non-intervention, the rule laid down was fairly well justified; in its developments and extensions of recent years, it is, we are told, to be regarded as a mere rule of political conduct adopted by the United States, in no sense a rule of international law, and in some cases leading to action contrary to its best established principles.

In regard to political crimes for which extradition is usually refused, the author pronounces decidedly in favor of the elimination of anarchical crimes from the privileged class, and also of a rule by which the assassination of the head of a foreign state, or a member of his family, should not be regarded as political. It need not be said that there is much to be alleged in favor of both these suggestions and some practical difficulties to be met.

Perhaps one of the most suggestive chapters of the work is that on Administrative International Law, in which are detailed the manifold interests that have in one form or another come under the joint care of the civilized states. In this direction lies the hope of the future. Already in a treatise on International Law, the section devoted to the laws of war begins to shrink notably, and doubtless Professor Diena would join cordially in the wish that the place to which the subject is entitled may still grow less.

There is one serious criticism to make — on the absence of a full index — which may possibly, however, be intended to appear in the succeeding volume.

JAMES BAROLAY.

American Foreign Policy. By a Diplomatist. Boston and New York. Houghton Mifflin Company. 1909. pp. vii, 192.

This book might more properly be called "Suggestions concerning future American Foreign Policy," for in it the author advances his ideas of the foreign policy which he thinks ought hereafter to be adopted by the United States. In the elaboration of his proposed policy, he considers, in separate chapters, the questions which arise out of our relations with the Philippines, with the Latin Republics, with Europe in consequence of the Monroe Doctrine, with the separate European states, with the Far East, and with the Near East. He has a final chapter in which he advocates an organization of the State Department in a manner which he regards as necessary in order that his proposed policy may be carried into effect.

The main thesis of the book, stated in the first chapter, is that our traditional policies are outworn, and that a new foreign policy, based on new principles, is necessary. This proposed new policy the author calls "the policy of understandings." The following quotation (pp. 13-14) will explain the meaning of this expression:

The most striking development in modern diplomacy has been the vast extension given within quite recent times to the system of arrangements and understandings which now link together the nations of Europe. These differ radically from the eighteenth-century idea of alliances, which were mainly offensive in purpose, even when restricted in their liability. The new conception, on the contrary, is eminently pacific in character, and limited in application to comparatively narrow ends. It aims within certain determined regions to preserve actual conditions and to eliminate possible causes of conflict, chiefly in colonial spheres, by taking cognizance of the special or mutual interests of the powers concerned, and lending to the preservation of such agreements the force that is derived by co-operation of effort.

The author advises an immediate application by this nation of this policy of understandings, in order to forestall an imagined hostile coalition. He proposes that the United States enter into an understanding with Great Britain — and also with France, though he regards Great Britain as most important — according to which the United States would guarantee to these nations their sovereignty of their present possessions in the Pacific Ocean, and they, in return, would guarantee the integrity of the whole American continent (including, of course, the integrity of this nation itself), the neutrality of the Panama Canal, and our sovereignty of our possessions in the Pacific, and would in addition acknowledge that this nation has a sphere of influence and jurisdiction,

warranting it in active and permanent intervention to such extent as it may deem to be necessary, from the southern border of Mexico to the river Orinoco. He considers that by such an arrangement we should secure an international recognition of the Monroe Doctrine. He also asserts that such an arrangement would not entangle us in European affairs.

That this nation should ask any foreign nations to guarantee its own integrity and that of the Latin Republics, is, it would seem, inconceivable. But, if we can suppose such an action on its part, it is, it would seem, inconceivable that any nations would guarantee the integrity of this nation without their own being guaranteed in return. It is equally inconceivable that the United States should ever ask any foreign nation to recognize the Monroe Doctrine in consideration of a *quid pro quo*. This would be an abolition of that doctrine. The Monroe Doctrine is a permanent international fact or principle, and is not subject to bargain and sale. It has frequently been acted upon by foreign nations, and has received the voluntary recognition of the society of nations. On account of it, France withdrew from Mexico, and Great Britain submitted the Venezuelan boundary question to arbitration. It is the basis of the existing agreement between the American Republics for the advancement of their mutual social and economic interests, under the Bureau of American Republics as a permanent secretariat. In late years the position of the Monroe Doctrine as an international fact has become still more accentuated. Dr. Andrew D. White, in his *Autobiography*, has given a graphic account of the presentation of that Doctrine by the American delegates to the Hague Conference of 1899, as a reservation to the Convention adopted by that Conference, and of its reception without dissent. The adoption of the Drago Doctrine by the Latin Republics further committed them to the Monroe Doctrine, since it is a matter of common knowledge that the former Doctrine depends upon the latter. The acceptance by the Hague Conference of 1907 of the principle of the Drago Doctrine necessarily implied a recognition by that Conference of the Monroe Doctrine as an international fact. Dr. James Brown Scott, in his recent book on "The Hague Peace Conferences of 1899 and 1907," well says:

The convention for the limitation of force in the collection of contract debts is a contract, entered into by the nations of the world, and, at one and the same time, a solemn and formal recognition of the Monroe Doctrine. Through Dr. Drago, the Monroe Doctrine has made its formal entry into public law as distinct from national policy.

The policy of understandings is thus seen to be inadmissible as it respects the Monroe Doctrine. But the author asserts that it is not only admissible, but desirable, as an intermediate policy between the eighteenth-century policy of alliances which would entangle us to our disadvantage, and a policy of isolation to which he asserts we are now committed. An analysis of the author's own argument will show that the policy which he proposes is not such an intermediate policy as he imagines it to be, and is in fact nothing but a policy of entanglement; and that the truth is, that our traditional policy is such an intermediate one, avoiding entanglement on the one hand and isolation upon the other.

The author admits that a great obstacle in the way of the acceptance by this nation of his proposed new American foreign policy is the doctrine of President Washington, set forth in the Farewell Address. The sentence in which Washington declared it to be "our true policy to steer clear of permanent alliances with any portion of the foreign world" is interpreted by the author as applicable only to past conditions, and as being, even in the past, only applicable to our relations with the states of Europe. The argument is based by him upon the sentence in which Washington laid down the principle that, "taking care to keep ourselves on a reasonable defensive posture, we may safely trust to temporary alliances for extraordinary emergencies." It will at once occur to any one that the understandings proposed by the author do not fall within the class of "temporary alliances for extraordinary emergencies," which Washington regarded as permissible, but within the class of "permanent alliances," which were regarded by Washington as inadmissible.

Washington gave his reasons for advising against permanent alliances in that part of the Address in which he asserts that, for any favor which one nation accepts from another, whether it be by way of commercial or social preference, or by way of military or naval assistance, "it must pay with a portion of its independence." It is evident from a careful reading of the Address that it was because of this inevitable loss of independence by a permanent alliance that Washington characterized permanent alliances as necessarily "entangling." To state more fully Washington's reasoning, it seems to be this: Any permanent alliance, whether by express agreement or by understanding, necessarily involves either that one nation shall commit itself to some extent to the policy of the other while the other's policy remains unchanged, or that both shall commit themselves to a policy of compromise between the policies which each, if not allied to the other, would pursue. Such yield-

ing by one nation to another, or such compromise between them, Washington rightly described as "entanglement."

This "Washington Doctrine" — if so it may be called — asserts that the true policy of this nation (and incidentally of every nation) is to keep on equal terms with other nations by dealing justly with all. This is not a policy of isolation, but a policy of self-reliance based on the intention to do justice and to see that justice is done. The isolation of this nation to which Washington in the Farewell Address called attention was a geographical isolation. From this geographical isolation arises, as he said, a peculiar opportunity for this nation to assert and maintain his doctrine. This geographical isolation is a permanent fact, and the peculiar opportunity of this nation as a member of the society of nations, to which he refers, is thus a permanent opportunity. The Monroe Doctrine is essential in order that we may take advantage of our opportunity.

Adherence to Washington's principles does not involve dissent from the author's view that there ought to exist between this nation and Great Britain a peculiar bond which ought gradually to increase in strength. The political conceptions of Great Britain, like those of this nation, are based on English jurisprudence and English public law, and tend naturally, in the course of their evolution, to assimilate themselves to those which were worked out by this nation in the stress of the Revolution and during the period when the Constitution was being formed. In so far as such a bond may exist, there ought to result from its existence, according to Washington's principles, not a semi-secret understanding, but an open and peculiarly harmonious cooperation of each nation with the other for the maintenance of the peace of all nations through the doing of equal justice to all. Such cooperation would of course be entirely consistent with both nations cooperating with other nations for the same purpose.

But it is not necessary to base the objections to the author's proposal upon any national doctrine. There is a much wider ground of objection. It seems clear that it is a misinterpretation of history to regard the "policy of understandings" as a new policy destined to supplant our existing policy, and that the truth is that the "policy of understandings" is only a survival, in a disguised form, of the old policy of alliances which is itself outworn and which is destined to be supplanted by the very policies which are traditional with us. The author by necessary implication himself suggests the weakness of his proposed policy when he likens

a diplomacy which rests upon the "policy of understandings" to a gambling operation. He says (p. 32):

The nations of Europe have been aptly compared by M. d'Haussonville to a party of gamblers seated around a green cloth grown somewhat shabby with age, where each in turn takes the bank. A newcomer enters, his pockets bulging with gold, and startles the players into a fear that he may at once break the bank. In destroying the time-worn conception as to the exclusive supremacy of Europe, we appeared as intruders, and as such were unwelcome. * * * Change has come through the enlargement of what had been a restricted horizon to its present globe-embracing proportions. A concert of world-powers has dispossessed the concert of Europe. While the European nations are rapidly adapting their diplomacy to conform to the new requirements, we have emerged from our aloofness handicapped by the weight of a traditional policy no longer in touch with actual conditions.

The "green cloth" about which the nations of the world are seated is not "shabby with age," but is that of a new green table of an international conference held in the country consecrated by the genius of Grotius to the conception of the whole world as a society of nations, existing under and recognizing a supreme law which all nations ascertain and enforce. When one considers the establishment of the principle of international arbitration and the pending negotiations for the establishment of a permanent international court, it seems strange indeed to apply to the nations of Europe or to the concert of all the powers the simile of "a party of gamblers seated around a green cloth grown somewhat shabby with age." Such a simile would, however, be entirely proper as applied to a society of nations whose relations should be determined by their various semi-secret understandings. However necessary such understandings as the author proposes may be for certain nations in order temporarily to tide over exigencies growing out of the inheritance from the past, they are happily not necessary for this nation.

The author fails to appreciate the rapid and persistent evolution of what Rivier aptly called "the common juridical conscience," which is steadily abolishing the game of diplomacy by producing a world-wide conviction that stability of existing governments is to be brought about only by the doing of justice; that justice can be done only through the establishment, by common consent, of just principles of political, social and economic law; and that it is the province of diplomacy to recognize existing laws, to evolve new laws to meet new conditions, and to formulate just agreements based upon these laws.

This nation, steadfastly adhering to the principles of Washington, has

been the leader in the establishment of the conception of international law as a universal equity. It is not probable that it will ever deviate from these principles. Rather is it probable that other nations will adopt them.

After so much criticism of the book, it would be unjust not to say that it gives the public in a brief form an idea of the multitudinous questions arising in all parts of the world with which the State Department is called upon to deal; and that, in the chapter on reorganization of the State Department, the author makes some suggestions which are probably of value.

The book abounds with proposals of a policy to be pursued in many matters now pending or likely to arise. Many of these proposals are open to challenge. If the book provokes an examination by the public into the justice and necessity of the traditional American policies, it will be useful. Standing by itself as giving an idea of what our foreign policy is likely to be, it will, in the opinion of the reviewer, be regarded by the great majority of American students of international affairs as being in many respects misleading.

ALPHEUS HENRY SNOW.

PERIODICAL LITERATURE OF INTERNATIONAL LAW

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THE BASIS OF PROTECTION TO CITIZENS RESIDING ABROAD¹

I shall ask you to listen for a few minutes to some remarks regarding the protection which a nation should extend over its citizens in foreign countries. I do not select this topic because I have anything new to say about it, or because there is any real controversy among international lawyers concerning the principles involved or concerning the fundamental rules to be applied, but because there is a considerable degree of public misunderstanding about the subject, and situations are continually arising in which a failure of the public in one country or another to justly appreciate the extent and nature of international obligation leads to resentment and unfriendly feeling that ought to be avoided.

The subject has grown in importance very rapidly during recent years. The world policy of commercial exclusiveness prevailing in the early part of the last century has practically disappeared. The political relations on the one hand and the commercial and industrial relations on the other hand of different parts of the earth to each other are quite separate and distinct. It is not uncommon to find that a nation has commercial colonies which bear no political relation to her whatever, and political colonies which are industrially allied most closely to other countries.

The increase in facilities for transportation and communication — steamships and railroads and telegraphs and telephones — has set in motion vast armies of travelers who are making their way into the most remote corners of foreign countries to a degree never before known.

The general diffusion of intelligence among the people of all civilized, and to a considerable degree of semi-civilized, countries, has carried to the great mass of the people — the working people of the

¹ Opening address by Hon. Elihu Root, president of the American Society of International Law, at the fourth annual meeting of the Society, in Washington, April 28, 1910.

world — a knowledge of the affairs and the conditions of life in other lands; and this, with the cheapness and ease of transportation, has led to enormous emigration and shifting of population. One of the salient features of modern political development has been the severance of the people from the soil of their native countries. The peasant, who was formerly a fixture in his native valley, unable to conceive of himself as a part of any life beyond the circle of the surrounding hills, now moves freely to and fro, not only from one community to another, but from one country to another. Labor is becoming fluid, and, like money, flows towards the best market without paying much attention to political lines. The doctrine of inalienable allegiance so inconsistent with the natural course of development of the new world, and so long and so stoutly contested by the United States, has been almost universally abandoned. It is manifest that the few nations which have not given their assent to the right of their citizens to change their citizenship and allegiance as they change their residence will not long maintain their position. This change has led to a new class of citizens traveling or residing abroad; that is, the naturalized citizen, who, returning to his country of origin or going to still other countries, claims the protection not of his native but of his adopted government. Among the great throngs of emigrants to other countries may be distinguished two somewhat different classes — one composed of those who have transferred their substantial interests to the new country and are building up homes for themselves; the other class composed of those who still continue their principal interests in the country from which they have come and under their new conditions are engaged in accumulating means for the better support of the families and friends they have left behind them, or for their own future support after the return to which they look forward.

The great accumulation of capital in the money centers of the world, far in excess of the opportunities for home investment, has led to a great increase of international investment extending over the entire surface of the earth, and these investments have naturally been followed by citizens from the investing countries prosecuting and caring for the enterprises in the other countries where

their investments are made. For example, it was estimated three or four years ago that within the preceding ten years over seven hundred millions of capital had gone from the United States alone into Mexico for investment; and this capital had been followed by more than forty thousand citizens of the United States who had become resident in Mexico. This same process has been going on all over the world.

All these forms of peaceful interpenetration among the nations of the earth naturally contribute their instances of citizens justly or unjustly dissatisfied with the treatment they receive in foreign countries and calling upon their own governments for protection. In two directions the process has gone so far as to justify and receive limitation. On one hand, there has come to be a recognition of the essential difference between emigration *en masse*, by means of which the people of one country may virtually take possession of considerable portions of the territory of another country to the practical exclusion of its own citizens, and the ordinary travel and residence upon individual initiative to which the usual conventions relating to reciprocal rights of travel and residence relate. The occasion for considering this difference naturally depends very much upon the capacity of the emigrants for assimilation with the people of the country to which they go. The wider the differences in race, customs, traditions, and standards of living, the less is the probability of assimilation and the greater the certainty that emigration of large bodies of people will assume the character of peaceful invasion and occupation of territory. After many years of discussion China has come to recognize the existence of such a distinction in respect of Chinese emigration to North America. Japan has recognized it from the first, and there has never been any question between the Governments of Japan and the United States upon that subject.

On the other hand, the United States has itself put a limit upon the practice, which had already reached the point of serious abuse, of permitting the natives of other countries to become naturalized here for the purpose of returning to their homes or seeking a residence in third countries with the benefit of American protection.

Several years ago it was estimated that there were in Turkey seven or eight thousand natives of Turkey who had in one way and another secured naturalization in the United States and had gone home to live with the advantage over their friends and neighbors of being able to call upon the American embassy for assistance whenever they were not satisfied with the treatment they received from their own government. At the time of the troubles in Morocco, which were disposed of at the Algeiras Conference, an examination of the list of American citizens in Morocco showed that one-half of the list consisted of natives of Morocco who had been naturalized in the United States and had left this country and gone back to Morocco within three months after obtaining their naturalization papers. We have now adopted a rule, which has been embodied in a number of treaties and in the Act of Congress of March 2, 1907, for the purpose of checking this abuse. The new rule is, that when a naturalized citizen leaves this country instead of residing in it, two years' residence in the country of his origin or five years' residence in any other country creates a presumption of renunciation of the citizenship which he has acquired here, and unless that presumption is rebutted by showing some special and temporary reason for the change of residence, the obligation of protection by the United States is deemed to be ended.

I have dwelt upon the magnitude and diversity of the causes which are resulting in the presence in each civilized country of great numbers of citizens of other countries, because conditions so universal plainly must be dealt with pursuant to fixed, definite, certain, and universally recognized rules of international action.

The simplest form of protection is that exercised by strong countries whose citizens are found in parts of the earth under the jurisdiction of governments whose control is inadequate for the preservation of order. Under such circumstances in times of special disturbance it is an international custom for the countries having the power to intervene directly for the protection of their own citizens, as in the case of the Boxer rebellion in China, when substantially all the Western powers were concerned in the march to Peking and the forcible capture of that city for the protection of the legations.

On a smaller scale, armed forces have often been landed from men-of-war for the protection of the life and property of their national citizens during revolutionary disturbances, as, for example, in Central America and the West Indies. Such a course is undoubtedly often necessary, but it is always an impeachment of the effective sovereignty of the government in whose territory the armed demonstration occurs, and it can be justified only by unquestionable facts which leave no practical doubt of the incapacity of the government of the country to perform its international duty of protection. It leads to many abuses, especially in the conduct of those nationals who, feeling that they are backed up by a navy, act as if they were superior to the laws of the country in which they are residing and permit their sense of immunity to betray them into arrogant and offensive disrespect.

Similar in principle to the method of direct protection which I have mentioned is the practice of exercising extraterritorial jurisdiction, under convention arrangements, in countries whose methods of administering justice are very greatly at variance with the methods to which the people of the great body of civilized states are accustomed, such, for example, as China and Turkey.

As between countries which maintain effective government for the maintenance of order within their territories, the protection of one country for its nationals in foreign territory can be exercised only by calling upon the government of the other country for the performance of its international duty, and the measure of one country's international obligation is the measure of the other country's right. The rule of obligation is perfectly distinct and settled. Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization.

There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon

which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens. In the famous *Don Pacifico* case, Lord Palmerston said, in the House of Commons:

If our subjects abroad have complaints against individuals, or against the government of a foreign country, if the courts of law of that country can afford them redress, then, no doubt, to those courts of justice the British subject ought in the first instance to apply; and it is only on a denial of justice, or upon decisions manifestly unjust, that the British Government should be called upon to interfere. But there may be cases in which no confidence can be placed in the tribunals, those tribunals being, from their composition and nature, not of a character to inspire any hope of obtaining justice from them. It has been said: "We do not apply this rule to countries whose governments are arbitrary or despotic, because there the tribunals are under the control of the government, and justice can not be had; and, moreover, it is not meant to be applied to nominally constitutional governments, where the tribunals are corrupt."

I say, then, that our doctrine is, that, in the first instance, redress should be sought from the law courts of the country; but that in cases where redress can not be so had — and those cases are many — to confine a British subject to that remedy only, would be to deprive him of the protection which he is entitled to receive. * * *

We shall be told, perhaps, as we have already been told, that if the people of the country are liable to have heavy stones placed upon their breasts, and police officers to dance upon them; if they are liable to have their heads tied to their knees, and to be left for hours in that state; or to be swung like a pendulum, and to be bastinadoed as they swing, foreigners have no right to be better treated than the natives, and have no business to complain if the same things are practiced upon them. We may be told this, but that is not my opinion, nor do I believe it is the opinion of any reasonable man.

Nations to which such observations apply must be content to stand in an intermediate position between those incapable of maintaining order, and those which conform fully to the international standard. With this understanding there are no exceptions to the rule and no

variations from it. There may be circumstances at particular times and places such that the application of the rule calls for action regarding foreign citizens quite unlike the action ordinarily taken for the benefit of native citizens, but it is always action which would be equally required in case a native citizen were placed under the same circumstances of exigency. It is plain that no other rule is practicable. Upon any other basis every country would be obliged to have two systems of law and administration and police regulations, and the existence of great numbers of foreigners in a country would be an intolerable burden. The standard to which the rule appeals is a standard of right, and not necessarily of actual performance. The foreigner is entitled to have the protection and redress which the citizen is entitled to have, and the fact that the citizen may not have insisted upon his rights, and may be content with lax administration which fails to secure them to him, furnishes no reason why the foreigner should not insist upon them and no excuse for denying them to him. It is a practical standard and has regard always to the possibilities of government under existing conditions. The rights of the foreigner vary as the rights of the citizen vary between ordinary and peaceful times and times of disturbance and tumult; between settled and ordinary communities and frontier regions and mining camps.

The diplomatic history of this country presents a long and painful series of outrages on foreigners by mob violence. These have uniformly been the subject of diplomatic claims and long-continued discussion, and ultimately of the payment of indemnity. An examination of these discussions will show that in every case the indemnity was in fact paid because the United States had not done in the particular case what it would have done for its own citizens if our laws had been administered as our citizens were entitled to have them administered. Of course, no government can guarantee all the inhabitants of its territory against injury inflicted by individual crime, and no government can guarantee the certain punishment of crime; but every citizen is entitled to have police protection accorded to him commensurate with the exigency under which he may be placed. If he is able to give notice to the government of

intended violence against him he is entitled to have due measures taken for its prevention, and he is entitled always to have such vigorous prosecution and punishment of those who are guilty of criminal violation of his rights that it will be apparent to all the world that he cannot be misused with impunity and that he will have the benefit of the deterrent effect of punishment.

It is a distressing fact that in one important respect the Government of the United States fails to comply with its international obligation in giving the same degree of protection and opportunity for redress of wrong to foreigners that it gives to its own citizens. The difficulties which beset aliens in a strange land are ordinarily local difficulties. The government and the people of the foreign country are usually quite ready, in a broad and abstract way, to accord to foreigners the fullest toleration, equality before the law, and protection. But the people of the particular community with whom the alien comes in contact too often fail of understanding and sympathy. They misunderstand and resent the foreign customs with which they are unfamiliar. They are aroused to anger by the competition to which the foreigner subjects them. Immediate contact is too apt at first to breed dislike and intolerance towards what Bret Harte describes as the "defective moral quality of being a foreigner." Our Constitution recognizes this natural and often inevitable prejudice by giving to our national courts jurisdiction over all civil suits between aliens and citizens of the United States. We fail to recognize the same conditions, however, in respect of the security of the persons and property of aliens. The Revised Statutes of the United States aim to protect citizens of the United States against local prejudice and injury by providing in section 5508:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

This provision, however, does not apply to aliens, and no similar provision applies to them. Accordingly, defenseless Chinamen were mobbed at Denver in 1880, and at Rock Springs, Wyoming, in 1885; Italians were lynched in New Orleans in 1891, and again at Rouse, Colorado, in 1895; and Mexicans were lynched at Yreka, California, in 1895; and Italians at Tallulah, Louisiana, in 1899, and again at Erwin, Mississippi, in 1901. Our Government was practically defenseless against claims for indemnity because of our failure to extend over these aliens the same protection that we extend over our own citizens, and the final result of long diplomatic correspondence in each case was the payment of indemnity for the real reason that we had not performed our international duty. In these discussions our State Department from time to time undertook to shelter itself behind the distribution of power in our constitutional system, and the fact that there was no law of the United States providing for any redress except at the hands of the State officials in the very locality where prejudice led to the injury. Yet when an American citizen was injured by a mob in Brazil in 1875, the dispatch of Secretary Fish to the American Minister at Rio said:

You represent that the facts as set forth in the memorial of the claimant are admitted by that Government, which, however, denies its accountability and says that the province where the injury to Mr. Smyth took place is alone answerable. Supposing, however, the case to be a proper one for the interposition of this Government, the reference of the claimant to the authorities of the province for redress will not be acquiesced in. Those authorities can not be officially known to this Government. It is the Imperial Government at Rio de Janeiro only which is accountable to this Government for any injury to the person or property of a citizen of the United States committed by the authorities of a province. It is with that Government alone that we hold diplomatic intercourse. The same rule would be applicable to the case of a Brazilian subject who, in this country, might be wronged by the authorities of a State.

And President Harrison, in his message to Congress of December 9, 1891, relating to the lynching of Italians at New Orleans in that year, said:

Some suggestions growing out of this unhappy incident are worthy the attention of Congress. It would, I believe, be entirely competent for

Congress to make offenses against the treaty rights of foreigners domiciled in the United States cognizable in the federal courts. This has not, however, been done, and the federal officers and courts have no power in such cases to intervene either for the protection of a foreign citizen or for the punishment of his slayers. It seems to me to follow, in this state of the law, that the officers of the State charged with police and judicial powers in such cases must, in the consideration of international questions growing out of such incidents, be regarded in such sense as federal agents as to make this Government answerable for their acts in cases where it would be answerable if the United States had used its constitutional power to define and punish crimes against treaty rights.

It is to be hoped that our Government will never again attempt to shelter itself from responsibility for the enforcement of its treaty obligations to protect foreigners by alleging its own failure to enact the laws necessary to the discharge of those obligations.

The most frequent occasions of appeal by citizens for protection in other countries arise upon the assertion that justice has been denied them in the courts, and this appears, unfortunately, to be a frequent occurrence. The justification of such complaints does not rest upon any obligation of another country to furnish any better or different judicial relief or procedure to foreigners than is provided for the citizens of the country itself, but it results from the fact that in many countries the courts are not independent; the judges are removable at will; they are not superior, as they ought to be, to local prejudices and passions, and their organization does not afford to the foreigner the same degree of impartiality which is accorded to citizens of the country, or which is required by the common standard of justice obtaining throughout the civilized world. When justice is denied for such reasons there is a failure on the part of the Government to perform its international duty, and a right on the part of the Government whose citizen has failed to secure justice to demand reparation.

A large proportion of such complaints are, however, without just foundation. Citizens abroad are too apt to complain that justice has been denied them whenever they are beaten in a litigation, forgetting that, as a rule, they would complain just the same if they were beaten in a litigation in the courts of their own country. When a man goes into a foreign country to reside or to trade he

submits himself, his rights, and interests to the jurisdiction of the courts of that country. He will naturally be at a disadvantage in litigation against citizens of the country. He is less familiar than they with the laws, the ways of doing business, the habits of thought and action, the method of procedure, the local customs and prejudices, and often with the language in which the business is done and the proceedings carried on. It is not the duty of a foreign country in which such a litigant finds himself to make up to him for these disadvantages under which he labors. They are disadvantages inseparable from his prosecuting his business in a strange land. A large part of the dissatisfaction which aliens feel and express regarding their treatment by foreign tribunals results from these causes, which furnish no just ground for international complaint. It is very desirable that people who go into other countries shall realize that they are not entitled to have the laws and police regulations and methods of judicial procedure and customs of business made over to suit them, or to have any other or different treatment than that which is accorded to the citizens of the country into which they have gone; so long as the government of that country maintains, according to its own ideas and for the benefit of its own citizens, a system of law and administration which does not violate the common standard of justice that is a part of international law; and so long as, in conformity with that standard, the same rights, the same protection, and the same means of redress for wrong are given to them as are given to the citizens of the country where they are. On the other hand, every one who goes into a foreign country is bound to obey its laws, and if he disobeys them he is not entitled to be protected against punishment under those laws. It follows, also, that one in a foreign country must submit to the inconvenience of proceedings that may be brought in accordance with law upon any *bona fide* charge that an offense has been committed, even though the charge may not be sustained. Nevertheless, no violation of law can deprive a citizen in a foreign country of the right to protection from the government of his own country. There can be no crime which leaves a man without legal rights. One is always entitled to insist that he shall not be punished except in accordance with

THE UNITED STATES AND LIBERIA ¹

To most persons in the United States the name of Liberia represents, if it means anything at all, the somewhat inglorious outcome of the dream of a few high-minded but impractical men, that they could solve the great question of slavery in the United States by transporting its negro population back to the shores of Africa. This aspect of the matter is so firmly lodged in the popular consciousness that the story of the intimate connection of the United States not only as a people but as a government in the founding of the negro republic comes as a surprise. Liberia is in fact the only colony which the United States ever established, and though political dependence, always vague, ceased many years ago, it has a rightful claim upon the sympathy and succor of the mother country.

To understand aright the newly awakened interest in the affairs of the Republic of Liberia we must recount with some detail the more than half-forgotten history of the relations existing between the people and the Government of the United States and the negro commonwealth. Such a recital will bring to light some rather unique colonial and international relations, and will, we believe, show the present concern of the United States with the welfare of Liberia to be no gratuitous meddling, but the revival of a deep and fundamental interest which though generally dormant has been for nearly a century one of our political traditions.

In the history of Liberia we see the reflex of the great struggle with slavery which dominated the first century of our national existence. Its inception in the second decade of the nineteenth century belongs to the period where the question of slavery was still largely academic, when the statesmen and thinkers of the slave States deplored its existence and discussed plans for gradual emancipation. Liberia is the product of Southern philanthropy, not the outcome of the militant type of anti-slavery sentiment which arose

¹ The writer of this article was chairman of the American Commission to Liberia in 1909. — Ed.

later in the Northern States. It owes its origin in large measure to the efforts of the Government to suppress the importation of slaves, and thus reflects another phase of the struggle against slavery. During the fiercer struggle of later years, the colonization idea appears as an olive branch held out by men of milder temperament to the more eager combatants on both sides of the contest. After the final appeal to arms, and the settlement of the question once for all, the people of the United States forgot Liberia, and the relatively few at best who had sought the welfare of the negro in his original home, turned their thoughts to other problems which confronted the reunited nation. But Liberia has not forgotten the land of its origin, and has time and again pleaded with the United States for sympathy and support. Nor have these ever been denied, a fact which in the present juncture of affairs encourages her in the hope that they may be extended in even greater measure.

In the early days of the nineteenth century there was a large body of public opinion in the slave-holding States which was far from enamored with the institution of human slavery. This was especially true in Maryland and Virginia, where it found a practical expression in the not infrequent emancipation of slaves, especially by testamentary disposition. By this means there arose a not inconsiderable body of free negroes who were plainly out of place in commonwealths whose laws, social traditions, and economic order, were based upon the antithesis of freeman and slave, which in this case meant white and black. The free negro was looked upon by many as the peaceful Indians were regarded, as in the body politic yet not a part of it. It was partly the desire to better the condition of the free negro, partly no doubt the fear that his presence might be a harmful influence among the blacks held in bondage, which first suggested the idea that he be sent back to Africa where he belonged.

The idea of a sort of expiatory repatriation of the African had been preached in the United States before the Revolution.² In

² See Ferguson, John. *Memoirs of the Life and Character of the Rev. Samuel Hopkins, D. D.* Boston, 1830. Hopkins' idea was mainly that of missionary effort to Christianize Africa, to be conducted by negroes trained for that purpose in America. Out of it grew, it is said, the notion of a permanent settlement of our American blacks in Africa.

England the efforts of Wilberforce had been instrumental in planting a colony of emancipated British slaves in Sierra Leone. The State of Virginia had occupied itself with the question, and had sought the aid of the general government to secure some appropriate place for the settlement of free negroes.³ These tendencies came to a focus in the American Colonization Society founded in 1816 in Washington through the efforts of Rev. Robert Finley. It counted its supporters among the leading men of the nation. Henry Clay presided over its initial meeting held in the hall of the House of Representatives, and Justice Bushrod Washington was long its president.

Preliminary arrangements for the proposed colony were made in 1818 when representatives of the society visited the coast of Africa, and negotiated for the cession of Sherbro Island in the present colony of Sierra Leone. Two years later a body of emigrants was sent thither under the convoy of the United States sloop of war *Cyane*. The hostility of the natives caused the abandonment of the project and the retirement of the would-be colonists to Sierra Leone. A second expedition in 1821 found a more suitable site at Cape Mesurado, but were unable to come to terms with the natives, until the arrival of Lieutenant Stockton of the *U. S. Schooner Alligator*, who, with Doctor Eli Ayres, agent of the Society, forced the natives to enter into a deed of cession. Part of the purchase price was paid from the ship's stores. To the energetic action of an officer of the United States Navy the colony owes its existence.

If the United States Government thus exhibited, as we have seen, a fatherly interest in the projected colony, it was because it was from the start a partner in the enterprise. The importation of slaves into the United States being forbidden, the United States joined with the other maritime powers, and especially Great Britain, in the effort to suppress this traffic at its source and employed its navy for this purpose. We could not, as did other nations, leave the matter largely to Great Britain. We had vigorously denied the right of search, and our flag protected American vessels off the coast

³ See McPherson, J. H. T. *History of Liberia*. Johns Hopkins Studies, 1891, p. 17 et seq.

of Africa as well as elsewhere. To maintain the principles in whose defense we had become involved in the war of 1812 it became necessary to take an active part in the suppression of the slave traffic.

One of the embarrassments of this policy was the question what to do with the slaves captured on the slave ships. They could not be returned whence they came. To do so would be to return them to the native slave-dealers or the middlemen who had sold them into captivity. Great Britain had an asylum for these unfortunates in the colony of Sierra Leone. When in 1819 the President was empowered by Act of Congress to provide in Africa a suitable place for the recaptured Africans the projected colony of the American Colonization Society offered a happy solution of the difficulty.⁴ The first expedition to Liberia was in a ship chartered by the United States Government to transport thither captured Africans who had been brought as prizes to the United States. The Government also agreed to take out such free emigrants as the Society desired to send to Africa. Out of this grew a regular system of settling these victims of the slave traffic in Liberia. Receiving stations were established, and for many years an agent of the United States was stationed in Liberia to provide for these persons rescued from slavery. In theory, the agent of the United States and the representative of the Colonization Society had entirely distinct functions. Practically they worked together, and not infrequently they were united in the same person. The colony of Liberia thus served a distinct purpose of the Government of the United States. Up to 1866 upwards of 5,000 persons were added to the population through the activities of our navy.⁵

In this manner the United States Government became an active

⁴ See Act of March 3, 1819, and special message of President Monroe, stating his interpretation of it, SUPPLEMENT, pp. 188 and 190.

⁵ In the *Memorial of the Semi-Centennial Anniversary of the American Colonization Society*, Washington, 1868, we find the following statement (p. 190) of the numbers sent to Liberia.

Settled by the parent society:	
Born free	4,541
Purchased their freedom	344
Emancipated to go to Liberia	5,957
"Freedmen"	753

partner in promoting the colony. It disclaimed being the managing partner, leaving that role to the Colonization Society, but its concern in the welfare and continuance of the settlement was more than that of friendly interest and good will. This attitude was strongly revealed in 1824. The young colony had suffered the usual privations which fall to those who engage in such enterprises, and had not escaped the bickerings and dissensions which so frequently mark the beginnings of such undertakings. Complaints against the Society's manager reached the United States, and the Government sent out to Liberia a special agent, Rev. R. Gurley, to examine into all controversies and report to the Government upon the same. This visit of Mr. Gurley not only evinced the interest of the Government, but proved extremely helpful to the colony. Assuming the role of a peacemaker, as a few years before Lieutenant Stockton had assumed that of a founder, he brought the warring factions together, suggested rules and regulations for the government of the settlement, and established the conditions of a healthier development.

The propaganda of the Society met with considerable success. Branch organizations were founded in several States, and then soon arose a series of settlements along what is now the Liberian coast, each under the fostering care of a separate State society. Of all the States, Maryland took the deepest interest in the matter. Its legislature provided by law that all free negroes should be deported, and contributed an annual appropriation of \$10,000 to the Maryland Society. Under the auspices of the latter the State of Maryland in Africa with its headquarters at Harper, Cape Palmas, was established. The colony was quite successful, though it held aloof from the other settlements. Under the management of the Maryland

From Barbados	346
Unknown	68
	<hr/>
	11,909
	<hr/>
Settled by the Maryland Society.....	1,227
	<hr/>
Recaptured Africans settled in Liberia by the United States Government	5,722
	<hr/>

Society it maintained a wholly separate existence till 1857 when it sought admission to the Republic of Liberia, and became a part of it.⁶

A confederation of the several settlements, except Maryland, was effected in 1837, and a definite form of government established.⁷ The governor was appointed by the American Colonization Society, but by the terms of this arrangement a self-governing community was established. This government subsisted till 1847 when the Republic was established.

The United States intervened so frequently between the natives and the colonists, patching up difficulties and settling disputes, that it was commonly understood that the settlements were under the protection of the United States. A naval squadron was maintained continuously in these waters, and the officers came frequently to the aid of the local authorities in adjusting their difficulties with the tribesmen by whom they were surrounded.⁸ Liberia was to all intents and purposes a *de facto* colony of the United States,⁹ but the time was approaching when it should become necessary to define

⁶ See Latrobe, J. H. B. *Maryland in Liberia*. Baltimore, 1885.

⁷ For form of government adopted, see SUPPLEMENT, p. 193.

⁸ An interesting account of many such affairs is given in the correspondence of Commodore Matthew G. Perry, 1843. Senate Executive Document 150, 28th Congress, 2d Session. See also Foote, Commander Andrew H., *Africa and the American Flag*, New York, 1854.

⁹ "The story of Liberia from its earliest inception to its elevation to independent statehood demonstrates its American character throughout. Its first foothold on the African coast was through the efforts of American citizens. From 1819 the association of the Government of the United States with the project is distinct. The colony was a necessary factor in the execution of a federal statute. The vessels of the United States participated in the initial act of colonization. Negotiations with the inland tribes for the purchase of lands were conducted by officers of the United States. Prior to the civil war the United States maintained a squadron on the west coast of Africa to suppress the slave trade, and the officers of this squadron lent their aid and assistance to the Liberians in their troubles with the natives. In 1886 Congress authorized the Secretary of the Navy to transfer a gunboat to Liberia, but no vessel was found available for the intended service.

"Thus the resources of the United States Government have been employed to colonize the liberated Africans, to build homes for them, to furnish them with farming utensils, to pay instructors for them, to purchase or charter ships for their convenience, to detail naval vessels for the transport of its agents and as convoys to the colonists, to build forts for the protection of the settlers, to

more precisely the legal relations, if any, which bound it to the mother country. The status of the Commonwealth of Liberia in the period preceding independence was peculiar. Within its territory it essayed to exercise the prerogatives of sovereignty, yet possessed none in law. Its laws and ordinances had the same binding force as the rules and regulations of an unincorporated association upon its members. Upon others they could have no effect unless voluntarily accepted by the latter. They were backed by no sovereignty either original or derived. In a sense under the protecting care of the United States, the colonists derived their form of government from a private company, and not from the government of the mother country.

To sustain the government which had been established the Commonwealth levied duties upon imports. It had by this time acquired possession of a considerable strip of coast-land extending from the limits of Maryland some distance to the west of its present boundary which it held by a somewhat precarious tenure. The attempt to collect duties placed trammels upon traffic with the natives along the coast which had hitherto been regarded as free. British trading ships contested the right of Liberia to collect duties and disregarded her authority. In this attitude they were supported by the colonial government of Sierra Leone. When the Liberians captured a couple of British boats engaged in this illicit trade and brought them to Monrovia for the trial of the cause, they were rescued by a government vessel from Sierra Leone, and demand was made upon the colony for indemnity. In a number of cases in the early forties the

supply them ^{..} with arms and munitions of war, to enlist troops to guard them, and to employ the army and navy in their defense. The lands which the several state colonies established were purchased with American money by the several state societies. The initial organization of the Commonwealth was perfected and controlled by the parent societies in the United States, and the eventual creation of the Republic of Liberia was due to the generous counsel and action of the American societies in advising the organization to become an independent state and in relinquishing to the new state the directory powers they had theretofore exercised." (Report of Mr. Knox, Secretary of State, to the President, March 22, 1910. Senate Document No. 457, 61st Congress, 2d Session.)

For a similar view, see N. J. Bacon, *Some Insular Questions*, Yale Review, August, 1901.

authority of the colonial government was flouted, and the governor was continually in hot water with his British neighbors.

The Colonization Society sought the aid of the Government.¹⁰ It hoped that the United States might make such representations at the Court of St. James as would put an end to these annoyances. It has been the usual history of establishments in foreign parts under the auspices of chartered companies that when international questions arose, the mother country has come to the aid of its citizens, with the usual result that recognized colonies have succeeded such *quasi-private* efforts. But the United States chose a temporizing course, and by declining to invest the colony of Liberia with the sovereignty of the United States, impelled it to assume a sovereignty of its own.

Our Government at the request of the Society made an informal representation of its interest in Liberia to the British Foreign Office. Our Minister in London was instructed, among other things, to say that while the American Government had passed no laws for their regulation it took a deep interest in the welfare of the people of Liberia, and was disposed to extend to them a just degree of countenance and protection.¹¹ Efforts were made by the Colonization Society and its friends to secure the direct aid of the Government in upholding the colony. The matter was brought before the House of Representatives in February, 1843, in a voluminous report from Mr. J. P. Kennedy of the Committee on Commerce. This report, one of the chief documentary sources for the history of Liberia, recites at length the circumstances of the founding of the colony, dwells particularly upon the services which it has and might render for the suppression of the slave traffic, and the advancement of American commerce, and contends for a more exact definition of its political relations to the United States. What they should be the writer of the report does not attempt to outline, though the whole tendency of the report is toward the adoption by the United States of Liberia as a colonial dependence of the national government.

¹⁰ See *Letter of American Colonization Society*, December 22, 1842, SUPPLEMENT, p. 207.

¹¹ Mr. Webster to Mr. Everett, March 24, 1843, SUPPLEMENT, p. 211.

This, however, is not openly expressed, and the report ends somewhat lamely with a resolution that the matter of political relations be referred to the Secretary of State with instructions to report therein to the next session of Congress. But the report, valuable as it is as a record, provoked no action by Congress.¹²

Conditions going from bad to worse so far as the relations of the Liberian settlements and British traders were concerned, the British Government was pressing the United States for a more definite statement of its attitude towards Liberia. The British Minister in Washington desired to know specifically whether the United States regarded Liberia as a colonial establishment and whether the United States was in any way responsible for the acts of Liberia towards foreign powers. He also asked what territorial limits were recognized as under the jurisdiction of Liberia, believing it disposed to extend its area and restrict the freedom of commerce.¹³

The reply of the Secretary of State, Mr. Upshur, puts at rest all the doubts as to the strictly legal relations of the United States with Liberia.¹⁴ Concerning Liberia he says,

it was not, however, established under the authority of our Government, nor has it ever been recognized as subject to our laws and jurisdiction. * * * This Government does not of course undertake to settle and adjust differences which have arisen between British subjects and the authority of Liberia.

These categorical statements, extracted from the midst of the somewhat voluminous communication, answer in unmistakable terms the questions submitted by the British Minister; but, as already indicated, the Secretary went further than a mere reply to the question put to him. At some length he explained the purpose of the colony and made a strong appeal for its friendly consideration by the British authorities. He says:

Its object and motive entitle it to the respect of the stronger powers and its very weakness gives it irresistible claim to their forbearance. Indeed, it may justly appeal to the kindness and support of all the principal nations of the world, since it has afforded, and still continues to

¹² For the report in full see SUPPLEMENT, p. 198.

¹³ Mr. Fox to Mr. Upshur, August 9, 1843, SUPPLEMENT, p. 211.

¹⁴ Mr. Upshur to Mr. Fox, September 25, 1843, SUPPLEMENT, 212.

afford, the most important aid in carrying out a favorite measure of their policy * * *. This Government regards it as occupying a peculiar position, and as possessing peculiar claims to the friendly consideration of all Christian powers. The Government will be at all times prepared to interpose its good offices and prevent any encroachment by the colony upon any just right of any nation; it would be very unwilling to see it improperly restrained in the exercise of its necessary rights and power as an independent settlement.

How far the Secretary's illuminating exposition of philanthropic ideas may have impressed the British authorities we are not advised. Certain it is that, finding Liberia could count on no further support from the United States than the interposition of good offices, Great Britain treated the colony as politically nonexistent and encouraged her citizens in the disregard of the Liberian regulations respecting trade within the limits of the settlement. Endless friction resulted. British trading ships were in frequent conflict with the Liberian authorities and their owners extricated themselves from their difficulties with the aid of British war vessels.¹⁵ As the difficulties with Great Britain increased, Liberia found itself in a situation in which it must relinquish its pretensions or take other steps to assume the powers and rights of an independent nation. The Colonization Society recognized that the existence of the colony demanded a relinquishment of the authority of the Society. It accordingly came to the conclusion that it must abandon its control and advised "the people of the Commonwealth of Liberia to undertake the whole work of self-government by appropriate amendments to their constitution."

In accordance with this advice, a convention was held in Monrovia in July, 1847, which adopted a constitution somewhat similar in form to those of the States of the American Union and declared the independence of the country. Elections were held under this constitution and the first president assumed office January 3, 1848.

The new republic was shortly afterwards recognized by Great Britain, a treaty of amity and commerce concluded, and diplomatic relations established. In a few years similar treaties had been made with other nations. Among the nations, however, who were inter-

¹⁵ See Johnston, Sir Harry, *Liberia*, Vol. 1, p. 192 et seq.

ested in the slightest degree in the western coast of Africa, the United States alone held aloof.

With the establishment of Liberian independence the interest of the United States in that country waned for the time being. The slavery question was now the burning question of our national life, and the recognition of the independent sovereignty of a negro republic and the establishing of diplomatic relations with such a nation could not be palatable to the people of the United States. We were, however, still concerned in the question of the slave traffic and still needed Liberia as a place in which we could deposit the Africans rescued from the slave ships.¹⁶ It was this which prompted our Government in 1850 to send again to Liberia Rev. R. R. Gurley as its agent to make a report upon the conditions of that country. His report to the Secretary of State is that of an enthusiast, who paints the conditions found in the Republic in such glowing terms that they fail to carry full convictions. He is convinced, however, that the time had not come to withdraw entirely the aid given the Colonization Society and expressed a hope that the United States would further the efforts of individuals and States in this direction. He concludes his report with the plea that the United States recognize the independence of Liberia and enter into treaty relations with that nation.¹⁷ The time was not ripe for such action. Resolutions forwarded to Congress by the legislatures of Northern States in this period urging the same course fell on barren ground. It was not until the period of the Civil War that our Government was disposed to recognize either Haiti, which had long pleaded for such recognition, or Liberia. In 1862 diplomatic relations were established with both countries. In October of that year a treaty was concluded with Liberia and shortly thereafter a diplomatic agent with the rank of Commissioner and Consul General was sent to that country.

With the emancipation of the slaves in the United States came a

¹⁶ See passage from President Buchanan's message of 1858, SUPPLEMENT, p. 218.

¹⁷ Senate Executive Document 75, 31st Congress, 1st Session. The concluding part of the report is quoted in the SUPPLEMENT, p. 215.

short-lived revival of the activities of the Colonization Society. In the later sixties a number of expeditions were sent to Liberia, and the Society was overrun with applications to be transported thither. It was wholly unable to meet the demands upon it from the freedmen, and could no longer secure the same measures of public support as before. It has not ceased to exist, but has not since about 1870 been active in sending out bodies of emigrants. With the gradual disappearance of the sailing ship, the commercial relations of the United States with Liberia and the whole west coast of Africa have languished. Actual intercourse between the United States and Liberia began to shrink, just at the time when we entered into treaty relations with that country and placed ourselves in a position to lend it sympathy and support. As a consequence, so far as the United States has been called upon to occupy itself with Liberian affairs, the impulse has not come from our own citizens, but such action has been at the instance of Liberia itself.

While it is true that shortly after the treaty of 1862 was concluded the United States gave expression to its friendliness in a statute which authorized the Secretary of the Navy to transfer a gun boat to Liberia, our subsequent relations with that country have consisted mostly of earnest though fruitless efforts to aid her in controversies respecting boundaries.

Liberia has not escaped the consequences of that movement of world politics which has been aptly described as the partition of Africa. This continent, so long neglected, became in the final quarter of the last century the object of desire of the European powers. There was a scramble among them to secure a foothold or to increase their possessions. In a series of international conferences the rules of acquisition and tenure have been agreed upon. Liberia as an independent nation in treaty relations with the European powers has been recognized in principle as not subject to occupation, but it has not been able to defend its outlying territories, at best vaguely defined, from the aggressions of her neighbors. Her title to these territories in dispute would have passed muster fifty years ago when nobody cared much about the limits of African states. It rested along the coast upon treaties with the original

natives of the regions. In the interior it extended in an indefinite way on the general principle that those who controlled the coast were accounted as entitled to some two or three hundred miles into the interior. The conferences before referred to introduced new principles of ownership in Africa and postulated that claims to jurisdiction should be backed by exploration and effective occupation. Just what constitutes an effective occupation has not been precisely determined, and there is ground for belief that it has been more strictly defined in dealing with Liberia than in the contentions of the European powers among themselves.

Liberia's first boundary dispute with Great Britain concerned mainly her western boundary along the coast. It dragged on from 1860 to 1885 when it was finally decided by a treaty disadvantageous to Liberia. At one time during the controversy it was proposed to settle the difficulty by a joint commission with the United States as umpire. Commodore Schufeldt of the navy proceeded to Africa for that purpose, but a disagreement arising between the British and Liberian officials as to the powers of the arbitrator, nothing was submitted to him, and the sessions broke up without result. By the treaty of 1885, forced upon the Liberians by the vigorous proceedings of the Governor of Sierra Leone who was in charge of the negotiations, Great Britain gained all for which she had contended. The whole controversy turned upon the validity of cessions from native chiefs which had been made at different times to both the Liberians and the British. It had its origin, at least, before the eyes of Europe had turned to Africa, and before the systematic acquisition of territorial claims began, which has been pushed so rapidly in recent years.

A glance at the map of Africa will show France established in Algiers, in Senegal, on the Ivory Coast, and at the mouth of the Congo. France has been credited with the ambition of uniting these scattered possessions into one continuous African empire. Towards this aim her explorations and activities seem to have tended. The dream can not be wholly realized, so far as uniting the French Congo with the other possessions is concerned, by the eruption of the Germans into the intervening territory and the recent extension

of British sovereignty in Nigeria. But these are comparatively recent developments. The first step in the process was to extend as far as possible the colonies of the Ivory Coast and Senegal and to unite them if possible.

In carrying out this policy Liberia has been the victim. In the first instance the French insinuated themselves into the coast region lying between the Cavally River and the San Pedro, a distance of sixty miles. Here they made treaties with the chiefs and assumed control, despite the fact that the territory had been conceded to be a part of Liberia for many years. In the long discussion which preceded the final adjustment, before Liberia was forced to yield, they not only contested the prescriptive right of Liberia, but made constant use of the argument that the Liberians had not established an effective occupation. Against the aggressions of France in these regions the United States made several pointed protests which were wholly disregarded. In the settlement of 1892 the Liberians yielded their point.

The boundary was apparently settled by this treaty, both as regards the coast and the interior, since pushing eastward from Senegal the French were already establishing a sphere of influence to the north of the colony of Sierra Leone and the Republic of Liberia, thus joining the colony of the Ivory Coast with that of Senegal. So far as Liberia was concerned the settlement was only temporary. Disregarding the line fixed by treaty, French commands found their way into the northern territory and established friendly relations with the natives. When explanations were demanded for these aggressions, France pleaded that the conventional line was wholly unsatisfactory, that the natives desired the protection of the French, and that Liberia had not established an effective occupation of the territories in question. The French, however, did not desist and finally in 1907 forced the Liberians into another treaty by which they gave up large territories which had for years been looked upon as a part of their original domain.

The unsettled relations with France had caused much anxiety to Great Britain. In 1898, at the instance of the British Ambassador in Washington, the United States joined that power in pro memorias

reciting the interest of each in the welfare of Liberia. These communications were received with expressions of gratitude by the Liberian authorities, but do not seem to have strengthened that government in any effective stand against the French aggressions.

Reviewing the relations of the United States and Liberia since 1862, when treaty relations were established, it appears that in various crises of Liberia's foreign relations, the good offices of the United States have been freely tendered. These situations have called forth an interesting series of expressions of sympathy and interest on the part of the United States.¹⁸ But beyond this fact it is not clear that the interposition of the United States has produced any very tangible results. It may be that the knowledge that the United States would at least protest against any injury to her protégé may have in some slight degree tempered the demands made upon her, but this of course is not susceptible of demonstration.

Despite the fact that Liberia has little to show as a result of our traditional friendship, she has turned to us again for aid and succor. In the summer of 1908 she sent a commission of leading citizens to implore the aid of the United States, and out of this visit has arisen an earnest search by our Department of State for methods whereby substantial aid and assistance can be rendered Liberia.

We can only briefly indicate the causes leading up to this new appeal. The Liberians felt in the spring of 1908 that France was absorbing their territory and Great Britain their government. The treaty of 1907 with France had been received with dismay. Great Britain had in 1907 indicated to Liberia that unless she put her house in order, introduced an effective frontier police, reformed her finances and her courts, and thus establish a government which could cope with modern problems, Liberia was likely to disappear as an independent nation, and had vaguely hinted that Great Britain might be the agency through which such a disappearance might be expected to take place. These suggestions became demands in a communication from the British Consul-General at Monrovia in January, 1908. With such a powerful stimulus to action, the gov-

¹⁸ These expressions in chronological order are given in the SUPPLEMENT, p. 220 *et seq.*

ernment established a force under English officers, increased the number of Englishmen in the customs service, and planned to give the chief inspector large powers with respect to internal finances. Small wonder that the fear arose that Great Britain was gradually insinuating herself into all branches of the administration.

The commission which visited the United States in 1908 hoped to check France by a treaty with the United States guaranteeing the territorial integrity and independence of the country, and hoped to check Great Britain by securing through the aid of our Government experts in various lines of administration who would help along rational reforms and dispense with British or other foreign officials.

That the United States could not undertake to establish a protectorate over Liberia is obvious, and the envoys were told so frankly. But the earnestness of their appeal convinced the Department of State that if anything could be done properly by our Government to assist these former wards of ours, it ought to be undertaken. Just what it might be was difficult to ascertain, and it was accordingly recommended that a commission be sent from the United States to Liberia and report upon the situation found there.

Before the American commission sailed it was clear that the reforms begun under British auspices had collapsed. Through a series of events, in which whatever blame attaches does not concern the principles involved but only the personalities of those entrusted with their execution, it had become evident that for the present at least, those excellent measures suggested by the British Foreign Office could not be carried out with the assistance of British officials. When the appointment of the American commission was under consideration, it was suggested by the British Foreign Office that the assistance which could be rendered by the United States would of necessity be additional to that being carried out by Great Britain. The situation had however changed when the commission reached Liberia. It was clear to the commission that if the United States were to render any assistance, she must take up the work which Great Britain was no longer in a position to perform and its recommendations have been made with that end in view.

The recommendations are now public property and may be briefly stated.¹⁹ They are:

1. That the United States extend its aid to Liberia in the prompt settlement of pending boundary disputes.
2. That the United States enable Liberia to refund its debt by assuming as a guarantee for the payment of obligations under such arrangement the control and collection of the Liberian customs.
3. That the United States lend its assistance to the Liberian Government in the reform of its internal finances.
4. That the United States should lend its aid to Liberia in organizing and drilling an adequate constabulary or frontier police force.
5. That the United States should establish and maintain a research station in Liberia.
6. That the United States reopen the question of establishing a naval coaling station in Liberia.

The foregoing is believed to be a consistent program of positive benefit to the people of Liberia, and a true embodiment of that peculiar interest in her welfare which has received such cogent expressions in our state papers. It is designed to render her substantial aid and furnish the basis for an orderly internal development. It introduces no new political principles and would tend to transform our oft-expressed "friendly interest" from words to facts.

ROLAND P. FALKNER.

¹⁹ Senate Document 457, 61st Congress, 2d Session, March 25, 1910.

THE SANITARY COMMISSION — THE RED CROSS

On April 29, 1861, at a meeting of a great concourse of women in the Cooper Institute, New York City, a movement was initiated which led to the organization of the United States Sanitary Commission.

As first formulated, the plan looked to an organization with full powers to establish for the benefit of the Army a preventive, hygienic and sanitary service, this under or independent of the Medical Bureau, as might be deemed most expedient.

To secure recognition from the War Department, the promoters of the movement laid their proposal before the Surgeon General in Washington, but received no encouragement.

It was well known to all and was called to the attention of the Secretary of War and the Surgeon General, that when the British Government, a few years before, learned of the dreadful mortality of the British Army in the Crimea, the most radical and previously unheard of measures were taken to remedy the situation.

For hospital reform and supervision Miss Florence Nightingale was sent to Scutari by the British Secretary of State for War with the most ample power to call upon the military authorities for any assistance she required and to adapt the administration of the hospitals to her plans in conformity with her orders. Miss Nightingale stated, what the official returns confirm, that during the first seven months of the campaign before Sebastopol, the British Army suffered a mortality at the rate of sixty per cent per annum. Other most radical steps for reform were taken, these consisting in placing the military authorities, so far as respected preventive measures and sanitation generally, under a civil commission of three British sanitarians.

The Secretary of State for War, in his instructions to those experts, said:

It is important that you be deeply impressed with the necessity of not resting content with the giving of an order, but that you see instantly,

by yourselves or by your agents, to the commencement of the work and to its superintendence day by day until it is finished.

Those who initiated the organization of the United States Sanitary Commission were familiar with the facts respecting this British Commission, whose report was dated December 1, 1856. They sought to secure from the Government at Washington similar plenary powers for supervision and intervention respecting preventive measures touching sanitation.

The Surgeon General and the other military authorities repelled the idea of their own subordination in respect to any military matter to a committee of civilians; the Sanitary Commission had to accept the rôle of a body invited to *inquire* into matters affecting health and to *advise* with the Medical Bureau relating thereto.

The official designation of the organization was *A Commission of Inquiry and Advice in respect of the Sanitary Interests of the United States Forces*. The War Department order ¹ notes that it was issued at the instance and in pursuance of the suggestion of the Army Medical Bureau and that the Commission was to exist at the pleasure of the Government, unless dissolved by its own action.

The persons to compose the directorate, which included the head of the Medical Bureau and two other military officers, were designated by the Secretary of War. He required that the inquiries of the Commission be directed

to the principles and practices connected with the inspection of recruits and other enlisted men; to means of preserving and restoring the health and securing the general comfort of the troops; to the sanitary condition of the volunteers; to the proper provision of cooks, nurses and hospitals; and to other subjects of like nature.

The Commission immediately organized, chose a president, vice-president, secretary and treasurer, increased its personnel to twelve, and, on the 13th of May, 1861, submitted for the action of the Secretary of War a "plan of organization" ² in which were set forth in some detail the powers and responsibilities of the organization. This was approved by the War Department the same day. The two papers

¹ Printed in SUPPLEMENT to this JOURNAL, p. 229.

² Printed in SUPPLEMENT to this JOURNAL, p. 230.

together, the *order* and the *plan*, constitute what may be called the Constitution of the Sanitary Commission.

Under the first branch of their responsibility — *inquiry* — the information sought was to cover the wants of the troops under the heads, what *must be*, what *is*, and what *ought to be* their condition.

In respect to the other branch — *advice* — the Commission was to prepare plans, undertake to secure their approval and enforcement by the military authorities, and their support by the benevolence of the public, — in short, to aid the Medical Bureau without displacing it or in any manner infringing upon its rights and duties.

A comparison of the measures adopted at Geneva in 1863 and recommended to the signatory powers for acceptance (*see below*) with those adopted by the Government of the United States in 1865 will show that there was no substantial difference so far as concerned results to be secured. The single motive actuating both the Geneva Conference and the United States Sanitary Commission was to devise a plan and means for aiding the medical services of the armies in campaign. At Geneva much was said about succor of the wounded and nothing about the general health and comfort of the troops. At Washington the succor of the wounded, although not specially referred to, was covered by the phrase "preserving and restoring the health and comfort of the forces." At Geneva it was proposed that all those connected with the medical services wear distinguishing marks or badges. At Washington there was no such proposal at the outset, but before the war was ended the helpers of the sick and wounded at the front and in the hospitals were wearing distinguishing marks. The delegates at Geneva asked that the nations confer upon the army sanitary services and their helpers the privilege of neutrality. This was asking for what both belligerents in the Civil War in America had more than a year before the meeting at Geneva already conceded as respected medical officers and other non-combatants taken prisoners. From and after the spring of 1862 all doctors and chaplains held as prisoners of war by the Union or Confederate forces, as well as those liberated on parole were released.³ General Beauregard appears to

³ Par. IV, G. O. No. 60, June 6, 1862, for the Union Army, and par. II and III, G. O. No. 45, June 26, 1862, for the Confederate Army.

have been the first to propose this humane treatment of physicians, April 13, 1862, and General Bragg, the same for chaplains, June 16, 1862.

As early as the eighteenth century in European wars surgeons and chaplains, on exchange of prisoners, were commonly released without equivalents or ransom.⁴

The international usage in this regard is stated by Lieber in his "Instructions"⁵ as follows:

The enemy's chaplains, officers of the medical staff, apothecaries, hospital nurses, and servants, if they fall into the hands of the American Army, are not prisoners of war, unless the commander has reasons to retain them.

This was published to the Union Army several months before the Geneva Conference met and more than a year before the International Congress convened.

It thus appears that the rules prescribed at the Geneva Congress, conferring the privilege of neutrality upon the sanitary or medical personnel and their attachés, was but the declaration of a status for this class of noncombatants that was in general harmony with many European precedents and strictly in accord with the American practice announced more than two years previously.

Thus America, in 1861, created a volunteer agency for war relief and this was soon developed into a powerful and efficient organization for safeguarding the health and succoring the sick and wounded in war. After its efficiency had been demonstrated the Geneva Congress formulated rules of international law to the same end. The sole original feature of the Convention of 1864 is found in the requirement that those engaged in relieving suffering of the troops as well

⁴ See Hall *Int. Law*, I : 422, who cites Moser IX, II : 255 and 260; De Martens, *Rec. VI* : 498-III : 306; *Precis* p. 276; Dumont VII, I : 231-Klüber 247; Heffter p. 126. Wellington Despatches, VII : 591.

⁵ G. O. 100. War Department, April 24, 1863, "Instructions for the Government of Armies in the Field." This work of Dr. Francis Lieber is the earliest formal exposition of the international laws of war that was published in any language. As issued by the War Department the monograph had the approval of a board, appointed by the Secretary of War, consisting of Dr. Lieber, the author, and Major-Generals Cadwalader, Hitchcock, Martindale, and Hartsuff of the Army.

as the hospitals for the sick and wounded, and their means of conveyance display a distinguishing mark — the Red Cross.

It is generally understood that the proposal to make the Greek Red Cross a universal badge of neutrality for those engaged in the succor of the wounded in war originated with the First International Conference that met in Geneva in October, 1863. The meeting was called by the Genevese Society of Public Utility,⁶ whose interest in the movement was brought about by M. Henri Dunant, the author of a pamphlet published in 1860, entitled *Un Souvenir de Solferino*. The author vividly portrayed the suffering of the wounded during the Italian campaign of 1859; showed how painfully inadequate were the means of relief controlled by the military commanders; urged the formation in each country of a permanent society for the succor of the wounded in war, the services of its benevolent volunteer personnel to be accepted as supplementing the efforts of the overworked official administrative staff; proposed that a condition of neutrality and freedom from capture by the enemy should attach to the official and nonofficial, regular and volunteer personnel of the medical services of the belligerent armies; and expressed the hope that some of the great military powers might accept these proposals by formal compact and so secure their recognition by the civilized world as governing in war.

The official reports of the first Geneva Conference and contemporaneous publications established the accuracy of the proposition that the idea of a distinctive and universal badge for the sanitary personnel serving with the armies and a recognition of their neutrality was proposed, discussed and adopted at the First International Conference. These proceedings were reported October 29, 1863, and immediately thereafter published to the world.

The result of the deliberations at Geneva, as respected volunteer aid for the wounded, was expressed in ten resolutions,⁷ in substance proposing the creation in all countries of committees and sub-committees of volunteers to aid the army medical services in the care of

⁶ See *Project of Declarations*, prepared by the Society, in SUPPLEMENT to this JOURNAL, p. 235.

⁷ SUPPLEMENT to this JOURNAL, p. 236.

the wounded, and in time of peace to prepare and organize for such coöperation, with accumulated supplies, and trained civil personnel. The individuals so employed were to wear "as a distinctive badge a white brassard (armlet) with a red cross."

Besides the declaration of principles expressed in the resolutions, the conference also recommended:

(a) That the army medical services, their volunteer assistants, and the inhabitants of the theater of war who might give shelter and succor to the wounded, be granted all the rights and privileges of neutrals that the laws of war sanction; and

(b) That all persons, official and unofficial, serving with the armies and with the ambulances and hospitals wear a distinctive uniform or sign, and that a uniform flag be adopted for all ambulances and hospitals.

There was no description of, nor any allusion to, the kind or form of the proposed cross to be shown on armlets by the volunteer helpers, save that it be *red*.

In the proceedings of the Conference there is nothing to indicate that there was any idea of simulating the national flag of Switzerland, formed by the combination as a cross of five rectangles, but there is circumstantial evidence that leads to such a conclusion.

The conference sitting at Geneva had no governmental sanction, and there was no basis for a hope that their declarations could be made effective saved as favored and adopted by the governments. This condition of affairs those sitting at Geneva clearly recognized. It was manifest that their declarations would be without intended beneficial effect unless they were officially adopted and accepted as international law.

So much encouragement to M. Dunant and his associate delegates resulted from the transactions at Geneva, and so apparent had it become that the action taken at the unofficial meeting would be of little use until it should be ratified by the nations and become a part of the laws of war, that early in 1864 a further movement was set on foot in Geneva to bring about the organization of an International Congress, composed of official delegates having plenary powers and whose action, if duly ratified, would be binding on the signatory nations.

On June 6, 1864, the Swiss Federal Council (supported by the Emperor of the French) issued a call for such a congress to meet in Geneva on August 8th, the same year, for the purpose of considering the resolutions and recommendations previously adopted at the conference. An invitation for the United States to send delegates was extended, but at this time the Civil War was in progress and the American Government could not bind itself in advance to accept the *dicta* of European powers in respect to so important a matter. Mr. Seward is reported to have remarked concerning this European meeting: ⁸

Our Government, while always ready to forward all humanitarian action, has a well-understood policy of holding itself aloof from all European Congresses or compacts of a political nature * * *. The Congress at Geneva being for the modification of *international laws of war* is one of great significance and the sending of delegates officially empowered to represent and act for the United States was from the many difficulties apparent, nearly or quite impossible. * * * The Government wishes to act as a free agent, with option in the premises, and in its own good time.

The representatives of some sixteen governments were present at the Congress, including two delegates from the United States.⁹ But those from America were accredited only for the purpose of

giving and receiving such suggestions as might be thought likely to promote the humane ends which have prompted the meeting.

It plainly appears from the reports of the American delegates and the *compte rendu* of the Congress that many members were entirely incredulous as to the possibility of securing adoption by the nations of so chimerical an idea as the ratification of the project for a treaty on the lines formulated by the conference of the year before, one that would permit the presence within the theater of hostile operations, and without the consent of military authorities, of possible spies or conspirators disguised or acting as volunteer Red Cross agents and employees.

⁸ See report of Mr. Chas. S. P. Bowles to the Sanitary Commission, September 15, 1864.

⁹ Messrs. George C. Flagg, U. S. Minister to Switzerland, and Charles S. P. Bowles, European Agent of the U. S. Sanitary Commission.

The American delegates endeavored to combat the adverse prejudices and cited at great length the achievements of the Sanitary Commission in relief of suffering in American camps and hospitals. Mr. Bowles, in his report to the Sanitary Commission, remarked:

But I was able to prove that this same "mythical" institution — the United States Sanitary Commission — had long since met with and overcome the difficulties which some delegates were now predicting and recoiling before; had long since solved, and practically too, the very problems which they were now delving over. Moreover I had just arrived from the scene of these labors in the United States, and with the battlefield, hospital and burying ground freshly pictured in my mind, could speak to them but too earnestly of war, the disease of all nations, and its known or proposed remedies. * * * I had brought with me from the United States the latest reports and most valuable publications — medical, statistical and others — of the Commission, and a number of large colored lithographs of the Philadelphia Sanitary Fair Buildings. I had also photographs of the principal depots and buildings of the Commission, with hospital plans and improvements of various kinds — developments of our war; photographs from life of the field relief corps, with its men, wagons, horses, tents and their arrangements and action. These life pictures, books and practical proofs, produced an effect as great as it was valuable. To many of them, earnest men seeking for light, with their whole hearts in the interest of a long suffering humanity, it was like the sight of the promised land. They had been working in the dark, and this was the opening of a window, letting in a flood of light and putting an end to all darkness and doubt.

The result of the deliberations was the Geneva Red Cross Convention of August 22, 1864,¹⁰ an international agreement by which twelve nations were bound and to which twenty other powers later adhered. A comparison of the treaty with the resolutions and recommendations passed at Geneva the preceding year, shows that the plenipotentiaries of the nations would not accept the proposals that volunteer aids and assistants for the wounded with troops in campaign should have an international guarantee of neutrality, save as allowed by the military commander; nor did they accede to the proposal that the governments be asked to accord their high protection to the volunteer-aid-committees.

The important net result of the Congress was an international agree-

¹⁰ See SUPPLEMENT to this JOURNAL for January, 1907 (Vol. I), p. 90.

ment that shielded military hospitals and ambulances containing sick and wounded and the persons employed therein from belligerent action and sanctioned the release of the medical and hospital personnel and the wounded in the discretion of the commander-in-chief. Such of the inhabitants of the country as might help the wounded or shelter them were to be protected. The armlet and flag it was declared "shall bear a red cross on a white ground," which was the exact verbiage proposed at the Conference of 1863, but there was as yet no specification touching the kind or form of cross, nor was there any reference in the *proces verbal* to the insignia as representing a reversal of the national colors of Switzerland.

The provisions of the Geneva Convention of 1864 remained unchanged until 1906, when there was a revision. In this second convention,¹¹ article 18 declared that:

Out of respect to Switzerland the heraldic emblem of the Red Cross on a white ground, formed by the reversal of the federal colors is *continued* as the emblem and distinctive sign of the sanitary service of armies.

This would seem to be conclusive that the arm badge and flag proposed in 1863 and adopted in 1864 were actually the same as described in the treaty of 1906, the colors of Switzerland reversed, whereon is displayed the Greek cross of a square surrounded by five equal rectangles.

The delegate at Geneva representing the Sanitary Commission concludes his very instructive report with an account of a banquet given to the delegates by the Swiss Federal Council and the city of Geneva:

..

The center of the table was a large piece of confection representing a fortress with its garrison and sanitary workers distinguished by the Red Cross brassard, pursuing their vocations. The tower was surmounted by small silk flags of the Swiss Republic and Canton of Geneva, crowned by a central flag with the Red Cross on a white field, the emblem of our neutrality just adopted by the Congress. After the first toast this flag was taken from its place by the President, who, turning to me as the representative of the United States Sanitary Commission, presented it as a token of appreciation of our labors for the good of all humanity.

¹¹ Printed in SUPPLEMENT to this JOURNAL for April, 1907 (Vol. I), p. 201.

This flag was doubtless immediately sent to the Sanitary Commission headquarters in the United States. That it bore a representation of the national flag of Switzerland, with colors reversed, a red Greek cross on a white field, is almost certain for it was declared at Geneva in 1906 that the Red Cross insignia — the colors of Switzerland reversed — had been in "continued use."¹² In this way, if in no other, a precise knowledge respecting the emblem was given to the American public.

The proof seems to be positive that the accomplishments before 1864 of this American organization manned by volunteers and financed by the charitable public, had been so notable and extensive that as a precedent it had a certain influence, and probably a very potent one, in determining the action of the Congress at Geneva in 1864.

Thus we see that the Sanitary Commission, the American prototype of the Red Cross, entered upon its career of benevolence and humanity more than two years before the Geneva Conference met and three years before the Congress at Geneva gave official sanction to the name now so well known. We also see that all the more important features of the Geneva Convention of 1864, respecting the treatment of the wounded and the sanitary and hospital personnel of armies in campaign were found in the laws of war as first stated and expounded by an American jurist more than a year before the meeting of the Geneva Congress.

The customary flag flown over American military hospitals in 1861-1864 was of yellow bunting. Hospital orderlies wore no distinguishing mark. The Sanitary Commission depots at the army field bases were marked by white flags upon which were displayed the United States shield and the initials U. S. S. C. worked thereon. Until 1864 the Commission workers wore no distinguishing mark or badge.

The Field Relief Corps referred to by the United States delegate

¹² The Swiss coat-of-arms dates from the pact of 1815. The seals and ensign of 1815 and 1848 showed a cross combining five equal squares. About 1890 this arrangement was modified, the emblem thereafter consisting of a central square and four equal rectangular arms or branches, each one-sixth longer than its own width.

to Geneva representing the Sanitary Commission, was organized on July 17, 1863, and coöperated with the military authorities in the care of the troops. On May 1, 1864, an adjunct to this organization, The Auxiliary Relief Corps, was formed for service with the troops and at hospitals. Those directing its work with the Army of the Potomac in 1864 saw the need of a distinguishing mark or badge so that their own personnel could readily be recognized on sight.

The authorized use of distinguishing marks for the armies of the Union began in February, 1863. This use was extended and in 1864 the flags, wagons and ambulances of the several corps, as well as the officers and men, were marked with or bore a distinguishing badge. This, for the men, was a small patch of cloth cut to some conventional outline and pinned to the hat or coat. The adopted form assigned to the 6th Corps was an equilateral five square Greek cross; the men, flags and wagons of the first division wearing *red* badges; the second, *white*; and the third, *blue*; that of the 5th Corps was a Maltese cross in the same colors. So, too, the shamrock, the star, the square, the triangle, the heart and the circle were adopted as corps badges. Some of these marks were in use before the meeting of the Geneva Conference of 1863. The Greek and Maltese crosses and many other forms had been adopted and were in use before the Geneva Congress met in 1864.

The need of some distinguishing mark for the Auxiliary Relief Corps was apparent. That the action of the Geneva Convention in proposing a Red Cross on a white field as a badge for those aiding the wounded in hospitals and elsewhere was known in the United States in the autumn of 1863 is well-nigh certain; and while there was nothing in the Geneva treaty respecting the kind or form of cross to be displayed, yet circumstantial evidence seems to be conclusive that it was the Greek cross that had been chosen, one formed by the combination of five equal squares, as in the flag of Switzerland, generally known as the Geneva cross. At any rate, it was the five-square white cross that was taken up by the Auxiliary Relief Corps, and worn by individual members, though it was not officially or formally adopted.

laws of the District of Columbia. On July 26, 1882, the United States adhered to the Geneva treaty of 1864, which at that time had been adopted by thirty-two of the independent nations, but it was not until August, 1884, that the War Department by general order adopted the Red Cross insignia for its ambulances, hospitals, medical officers, hospital corps, nurses and chaplains in the government service. There was still no official recognition of volunteer assistants, nurses, etc., with armies in the field, but in the revised Geneva Convention of 1906, which is more particularly referred to later, there is a provision that volunteer aid societies, if duly recognized by their own governments, shall be assimilated as to protection, etc., to the permanent medical services with the troops and entitled to the same rights of neutrality, privileges and immunities, such personnel to be subject to military laws and regulations.

This is the only provision in international law for the recognition of volunteer committees and helpers with the armies in the field. It signifies that they shall go to no place within the theater of military operations, nor do anything whatever in aid of sick and wounded or others, unless specially authorized by the commanding general or superior authority. In a democratic country, where all power is derived from the people, it may be accepted as a fact that much more latitude will be accorded to Red Cross volunteer assistants than would be tolerated in countries where the powers of government are more centralized. No matter how much may be the need of succor for the wounded and however inefficient may be the officially organized medical and sanitary services, the commanding generals, responsible for the exercise of authority and the results sought to be secured by war, will certainly look with suspicion upon the proposed presence in the theater of war of non-military persons ostensibly ministering to the aid of the sick and wounded, but who may be spies and conspirators. The presence of volunteer men and women within the field of operations ought not to be tolerated, and probably never will be, unless they are thoroughly organized, are amenable to discipline, and of undoubted fidelity and loyalty.

Paragraph 1263 of the Army Regulations, published in 1884, is as follows:

1263. The hospital ambulance flags of the Army are as follows:

For general hospitals, white bunting, 9 by 5 feet, with a red cross 4 feet high and 4 feet wide, of red bunting, in center; arms of cross to be 16 inches wide.

For post and field hospitals, white bunting, 6 by 4 feet, with a red cross 3 feet high and 3 feet wide, of red bunting, in center; arms of cross to be 12 inches wide.

For hospitals and guidons to mark the way to field hospitals, white bunting, 16 by 28 inches, with a red cross 12 inches high and 12 inches wide, of red bunting, in center; arms of cross to be 4 inches wide.

The arm badge (brassard) to be worn by all neutrals is as follows:

Of white cloth, 16 inches long and three wide, with a cross of red cloth 2 inches high and 2 inches wide, in center; to be worn upon the left arm above the elbow, in addition to insignia designating the military rank of the wearer.

This regulation still continues in force and since 1884 the Red Cross emblem has been used for its prescribed purpose in garrison, camps and in campaign, and by its volunteer helpers in the discretion of the commanding general as the exigencies of the service required. Its use prior to that date, as has been described above, was merely incidental, and due to the fact that the members of part of an army-corps were required to wear patches of cloth or metal representing a conventional Greek cross of red color, a badge that had no relation to the one suggested in 1863 and adopted at Geneva in 1864.

In 1868 an international congress was held at Geneva for the purpose of extending to maritime warfare the advantages of the Geneva Convention of 1864. Fourteen European states were represented by commissioners and, as a result of their deliberations, fifteen additional articles were adopted, five of which were additional to or an amplification of the ten articles of the Geneva Convention of 1864, and nine articles provided for an adaptation of the usages of war on the sea to those upon land in so far as concerned the treatment of the wounded, shipwrecked and sick officers and men, the medical, hospital and religious staff of captured vessels, their supplies and equipment designed for hospital use and the treatment of vessels manned and equipped by aid societies.¹³

¹³ See SUPPLEMENT to this JOURNAL, Vol. I, p. 92.

These additional articles were ratified by the United States in 1882, but owing to the proposed amendment of one article by one of the signatory powers, formal ratification of the treaty was never officially proclaimed, and the additional articles of 1868 to the Geneva treaty of 1864 never became operative.

At the Hague Conference of 1899, which was called at the instance of the Emperor of Russia, and at which the United States was represented by delegates, the dispositions respecting an adaptation of maritime warfare to the rules of the Geneva Convention of 1864 were set forth in fourteen articles.¹⁴ In these were embodied in substance the proposed supplementary provisions of the Geneva Convention. The United States ratified the treaty of 1899 and its provisions continued in force until 1907 when it was revised and expanded into twenty-eight articles,¹⁵ the United States being one of the signatory powers.

As has already been stated, the Geneva Convention of 1864 was revised by the International Congress of Geneva in 1906. The ten original articles were expanded into thirty-three and many new provisions were incorporated. It was to this revised Geneva treaty that the rules of naval war were to be adapted and adjusted. In the new Convention of Geneva is found a new provision for protecting the insignia of the Red Cross from misuse by private persons or by societies not recognized as entitled to it, and specially for stopping its commercial use as a trade-mark. Article twenty-seven provided (Great Britain dissenting) that all the signatory powers whose legislation did not adequately protect the insignia and name would take the necessary steps to prevent their unauthorized use. A similar provision is found in the Hague Convention of 1907.

The fact that a trade-mark is recognized as a common-law property right in many countries, of which the user can not be legally deprived, and the further fact that the red Greek cross has for many years been in very general use by commercial and manufacturing concerns as a commercial trade-mark, render the protection of the insignia, in the United States, to the extent and degree proposed by

¹⁴ See SUPPLEMENT to the JOURNAL of April, 1907 (Vol. I), p. 159.

¹⁵ See SUPPLEMENT to the JOURNAL of January, 1908 (Vol. II), p. 90.

the Geneva and Hague Conventions, an impossibility. In this regard, nothing more would seem to be practicable than to restrict the commercial use of the badge to those whose property right in it existed at the date when each state recognized its own national Red Cross and to forbid registration or use to all others. About one hundred fifty individuals and partnerships in the United States have registered the Red Cross as a trade-mark and these may continue to make use of it for commercial purposes, without other restriction than the laws impose.

The Hague Conference of 1899 agreed to and defined the Rules and Regulations for the Conduct of War on Land. Articles XV and XXI of these Rules¹⁶ are provisions that directly relate to the relief of prisoners of war, and to the obligations of belligerents in respect to the sick and wounded. This agreement of 1899 and the "Regulations" respecting war on land were revised at The Hague in 1907, but without material change as respects those two provisions that touch upon the work of the Red Cross.¹⁷

The American Association of the Red Cross, incorporated in 1881, engaged in various relief operations sanctioned by its charter in aid of the sufferers from war, fire, floods, hurricanes, famines, etc.

On January 6, 1900, the Congress incorporated the American Red Cross and there was a re-incorporation in 1905.

The records respecting the operations of the society in the United States previous to 1905 are very fragmentary and unsatisfactory. Since re-incorporation in 1905 there has been raised by voluntary contribution and expended in relief work in the United States and foreign countries about \$5,000,000, but no part of it applied to the succor of those wounded in war, because, fortunately, the occasion for such use has not arisen.

Since the re-incorporation of the American Red Cross in 1905 no occasion has arisen for the exercise of its functions in aid of the wounded soldiers or sailors of the United States, but there have been twelve occasions within the United States and its insular possessions and fourteen in other countries, of Red Cross participation in relief of

¹⁶ See SUPPLEMENT to the JOURNAL of April, 1907 (Vol. I), pp. 140 and 142.

¹⁷ See SUPPLEMENT to the JOURNAL of January, 1908 (Vol. II), pp. 103 and 105.

suffering, the funds for defraying the cost of these operations having been contributed by the public.

It is held by the management that the phrase last quoted whereby the Society is authorized to *devise and carry on measures for preventing suffering* warrants the assumption by the Red Cross of a class of work whereby relief is incidentally provided for minor disasters and the survivors of accidents, to the end that a force may be instructed and trained in relief work so that their expert services may be efficient in aid of the medical department of the armies and navies in campaign and also in succor of the victims of great non-military disasters.

In some countries the functions of the Red Cross are restricted to the relief of the sick and wounded in war, and in a few of the Latin-American republics the name "Red Cross" has been used to designate the medical and sanitary services as an integral part of the national forces, but in most of the nations the organization is authorized to participate in aid of the sufferers from great calamities when the resulting suffering is beyond the capacity of local measures of relief.

The United States was the first of the great powers to extend by legislative enactment its functions to what may be called *civil* in contradistinction to *military* relief and the general tendency now is to remove all restrictions to its operations in succor of all suffering. If this policy be applied generally it would seem to be an inevitable result that the Red Cross is to become the great national agency of benevolence and charity, operating not only throughout the length and breadth of the Union but participating in such work to the extent of its means in the relief of suffering in all countries, becoming in fact a national relief agency.

Its success or failure in this, or indeed in any rôle, must depend upon the efficiency, the integrity, the capability of its personnel and the strength of the organization. If the Red Cross is to command the confidence of the public, who alone are its clients, it must be able to show that their contributions will be more efficiently applied by it than through individual or local agencies.

The circumstances that attended the bestowal of official recogni-

tion upon the organization that proposed to itself the rôle of an auxiliary, to assist in the care of the sick and wounded in war and promote the general welfare of the American Army have been detailed. That the promoters of the movement should fail at first to fully realize their ideals in this novel and colossal undertaking is not surprising. It is well-nigh certain that the Medical Bureau, which, in 1861, gave its qualified indorsement to the proposal for a commission for inquiry and advice had little faith in a favorable outcome. But it was manifest to all in authority in Washington that the patriotic impulses of the public to assist in the cause of the Union by aiding their sons, brothers and fathers who were flocking to the colors, could not be restrained. The movement for extending aid through personal contributions of money, supplies, and services had to be reckoned with, and the legally organized military machinery for supplying the troops and caring for the men in camps and hospitals had to be adjusted to this condition, and so the public were told by the President, the Secretary of War, and the Surgeon General that its aid and assistance in safeguarding the health of the forces and in devising means for general relief, would be welcomed.

Of what may be called battlefield relief, *i. e.*, the collecting and transportation of the wounded to the field dressing stations, establishments which with their means of field transports in European armies are called *ambulances*, the Sanitary Commission undertook nothing. These establishments in European and the Japanese armies, maintained by the Red Cross, are very extensive, but this is a recent development, the detachments being made up of trained officers and men and the equipment a duplicate of what the war ministry provides for the official sanitary service. The volunteer personnel is under strict discipline and all are strictly subordinated to the chief of the regular sanitary corps. Had the Civil War continued another year, there can be no doubt that the ambulance service at the front would have been composed in part of Sanitary Commission Auxiliary Relief Corps detachments and equipment.

The evacuations of the battlefields and field hospitals by means of steamers and railway trains, manned, equipped, and supplied by

the Commission became an important part of its work, and was of vast assistance. The hospital cars of 1863 and 1864, planned and constructed under the supervision of the Commission agents, were models of adaptability and convenience. Much the largest part of the Commission's finances, however, were applied in general relief of the troops in camps and hospitals, supplying food, clothing, meeting deficiencies, and assisting in many ways. Soldiers' relief stations were established on the principal lines of communication where food and medical attention were dispensed; and wagon and railway trains and steamers, freighted with supplies, were constantly in service between the bases and the theaters of active operations.

There was no function of relief assumed by the Commission that the Red Cross has not also assumed, save hygiene. The sole deficiency in the organization and achievements of the former, was in respect of ambulance service on battlefields. Until the Russo-Japanese war of 1904-5 such service was not efficiently rendered on a considerable scale for troops in campaign, and will never be efficient unless its personnel and equipment are conformable as to training, discipline and pattern of equipment to the same features of the regular service and all strictly subordinated, as respects direction and control, to the Chief of the Sanitary Corps with the army in campaign.

While the Red Cross, sometimes referred to as an international organization, was the outcome of the work of the international meetings at Geneva, 1863-1864, yet the Red Cross of each country has no powers, rights, privileges, immunities, or responsibilities, that are not derived from the franchise or recognition conferred by the government of the state where it exists.

Since 1863 eight international conferences have been held in European capitals, composed of official delegates from the states and their Red Cross Central Committees. At these meetings there have been general consultations, exchange of ideas, consideration of plans for strengthening the organization, and the formulation of proposals or recommendations for organic changes or improvements. The Ninth International Conference will be held in Washington in 1912.

PRESIDENT'S ADDRESS ON OPENING THE NORTH
ATLANTIC FISHERIES ARBITRATION AT THE
HAGUE, JUNE 1, 1910.

Your Excellencies, Gentlemen: Ten years have elapsed since the Permanent Court of International Arbitration has been established by the first Conference of the Peace which has met under the reign of a glorious and all beloved Queen in this charming town.

In those few years already this novel institution has done a great deal of good all over the world. It has shown that, instead of appealing to brute force with all its casualties, cruelties, and injustices, differences, important differences between mighty States may be adjusted according to the laws of equity, justice, and humanity.

Tribunals instituted in virtue of the Conventions of 1899 and 1907 have decided disputes touching all four continents, divided in various realms, differences which have arisen in the North of Europe, in Northern and in Southern America, in Japan, in Arabia, and in Morocco.

The greatest Powers of the world have submitted by their free will to this Court, and nations of minor forces have found their protection before it.

Governments which once had appealed to this High Court have intrusted it a second and a third time with the decision of their conflicts; arbitrators who had been chosen in one case, have been nominated to decide other affairs, certainly the most convincing evidence, I think, that nations have been contented with the work that has been done here.

Matters of great importance have been adjusted in these modest, provisional rooms, some of them involving the most delicate questions of sovereignty and national pride, all implicating intricate problems of international law.

But perhaps never till now has there been intrusted to an arbitral tribunal a question of such gravity and of so complex a nature as in

the present case of almost secular standing. Many of the documents in this case are prior to the independence of the United States of America, some of them go as far back as the seventeenth century. Upwards from 1818, during more than ninety years, the questions implicated in the present arbitration have been the subject of almost uninterrupted diplomatic correspondence and transaction, and more than once they have brought the two great seafaring nations of Europe and America to the verge of the extremities of war.

And now these two nations, to which the world is indebted for so much of its progress in every sphere of human thought and action, have agreed to submit their longstanding conflict to the arbitration of this Tribunal.

In doing so, they have expressed their full confidence in this peaceful mode of resolving international differences, which the first Conference of 1899 has recognized as the most efficacious and at the same time the most equitable method of deciding controversies which have not been settled by diplomatic means.

In doing so, these Governments have set an example for the whole community of nations and have acquired a new merit in the sublime cause of international justice and peace, to the progress of which they have contributed perhaps more than any other nation, especially under the peaceful reign of a great King, whose premature and sudden loss his vast Empire lamented in the last weeks, and under the presidency of that illustrious Statesman who has the historical merit of having initiated the first meeting of this Court in the "Pious Fund" case.

Having been appointed by agreement of the Parties to be the Umpire in this arbitration and being therefore called to the high honor of presiding at these debates, it is my first duty to thank Their Excellencies the President and the Members of the Administrative Council of the Permanent Court for honoring the opening of these proceedings by their presence.

Then I may be permitted to offer a most hearty welcome to my eminent Colleagues and to the honorable and distinguished Agents and Counsel of the two litigant Parties.

Only consciousness of being at your side, my dear and most honored Colleagues, and of being assisted by your experience, your tact and your knowledge has inspired me with the courage to accept the functions so noble, but also so responsible and so difficult, incumbent on me in this arbitration.

Let me express to you once more in public, what I have said already to you in private, that I consider it the greatest distinction in my life to sit in your company in this historic proceeding.

My illustrious Colleagues and myself have studied in these last months with all care and assiduity the voluminous and highly interesting documents which have been presented to us by the Parties; but we have deliberately forborne to form a definite opinion on the arduous questions involved in the case, before having had the most valuable — I may say the indispensable — assistance from the speeches of those eminent lawyers and statesmen, who have accepted the functions of Counsel in this case.

Be assured, gentlemen representing the litigant Parties, that all we arbitrators are imbued with the sense of our responsibility not only to the Governments which honored us with their confidence and to the two great nations they represent, but also to the noble idea of international arbitration, so dear to all of us.

We are fully aware that with the end of promoting this peaceful mode of settling international differences the award we have to pronounce must by the force of its motives meet with the approval of all who by their unbiased knowledge of international law are entitled to criticize us.

Every sentence rendered by this Court ought to be by virtue of its impartiality and equity a new marble pillar to sustain the ideal palace of Justice and Peace, the symbol of which is to be that noble edifice which has been dedicated to this town by the munificence of a man whose name is dear to both litigant nations.

Being conscious of our responsibilities, we shall do our best to render justice to those "captains courageous" and hardy fishermen of both nations, who in the uproar of the sea and at the risk of their lives pile the treasures of the Ocean for the benefit of men. In doing our duty in that way, we hope to settle peacefully and definitely

a difference, which for so long a time has agitated the two branches of the Anglo-Saxon race.

May we, with the help of Him who bade His peace to all who are of good will, succeed in promoting the progress of mankind through Justice to Peace, *per justitiam ad pacem*.

HENRI LAMMASCH.

THE LEGAL BASIS OF THE RULES OF BLOCKADE IN THE DECLARATION OF LONDON

Every new agreement between nations changes the sources from which court decisions on subjects pertaining to international law are taken. In some cases, as that of the Declaration of Paris of 1856,¹ the rules laid down by a multipartite convention become almost the sole source of facts upon which they touch. Decision after decision of the courts goes no further than that Declaration for the rules as to blockade and neutral goods. Judges whose predilection for extensive citations of authorities is well known consider its provisions of so authentic a nature that they forego further investigation in cases where the point at issue is simple enough to be covered by the laconic statements of the Declaration.

But, on the other hand, the Declaration of Paris was a mere phrasing of principles generally recognized and for many decades before frequently laid down as almost axiomatic. Thus the Declaration of Paris can be considered best as a conventional statement of law previously established. This is generally the case with multipartite conventions, for the nations frequently have points of view too divergent to accept other principles than those already noncontestable or contestable to a slight degree only. Add the results of much compromising on specific points, and the general origin of the multipartite convention is stated.

To how great an extent the Declaration of London² will become for judicial purposes the source beyond which there will be no need of going must, of course, await the event to be ascertained. The rules of blockade phrased in it ought to suffice in a great majority of cases, for it includes the gist of the judicial decisions recognized as most authoritative. A comparison has been made between the text of the Declaration and adjudicated cases as published in Scott's *Cases on International Law* and some other sources, especially re-

¹ Printed in SUPPLEMENT to this JOURNAL, Vol. I (April, 1907), p. 89.

² Printed in SUPPLEMENT to this JOURNAL, Vol. III (July, 1909), p. 179.

ports. Realizing that the London Conference was participated in by European nations as well as by Great Britain and the United States, some attention has also been paid to the European point of view regarding the matters considered as expressed, for the most part, in Bonfil's *Manuel de Droit International* (cinquième édition, Paris, 1908). This study seemed particularly appropriate in view of the purpose of the Conference as stated in the preliminary provision:

The Signatory Powers are agreed that the rules contained in the following chapters correspond in substance with the generally recognized principles of international law.

The British delegates in their final report phrased this differently:

The purpose of the Conference has been, above all, to note, to define, and, where needful, to complete what might be considered as customary law.

The latter statement is perhaps preferable because the term international law is, for Anglo-Saxons, an indefinite one making no distinction between adjudicated law and the *dicta* and conclusions of text writers which are higher in favor among the Latin races as authorities than in the United States and Great Britain.

It may be said at the outset that the statement of the British delegates is an excellent one. A careful study of Chapter I of the Declaration and comparison of its provisions with the volumes mentioned above shows that the Conference did note, define and complete to a large extent what was already to be found in international legal rules.

In Chapter I, regarding blockade in time of war, fully half of the twenty-one articles is devoted to "completing" the *dicta* of customary law. This is perfectly natural, for a set of rules must necessarily lay down practical methods of carrying out their provisions, and this is a matter of which courts take little cognizance. Rules coming under this head are contained in Articles 8, 9, 10 and 11 relative to the contents of a declaration of blockade and the methods of notification; Article 13 relative to notification when a blockade is voluntarily raised; provisions in Articles 15 and 16 rela-

tive to methods of determining a vessel's knowledge of a blockade and the modes of informing her of an existing circumvallation; and provisions in other Articles.

Article I provides that

A blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy.

No adjudicated case hangs on the point regarding a blockade of a port or coast occupied by the enemy, probably because of the well recognized ability of a belligerent to treat such occupied territory as enemy country. In several American cases this was not even called in question. In *United States v. Rice* (U. S. Sup. Ct., 1819, 4 Wheaton, 246, Scott's Cas. 655), and in *United States v. Hayward* (1815, 2 Gall. 485, Scott's Cas. 657), Justice Story held that Castine, Me., was British territory while occupied by military forces during the war of 1812. "By the surrender," he says, in the first case. "the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws * * * as it chose to recognize and impose." In the second case it was held that Castine was to be considered a "foreign port" with reference to the non-importation acts.

A case arose as a result of the Spanish-American War in which a vessel sought to make port in Cuba. The *Adula* (176 U. S. 361, Scott's Cas. 826) was condemned as prize of war by the District Court after being captured in the attempt to reach Guantanamo, Cuba, and the decree of the lower judicial body was affirmed by the Supreme Court. A proclamation issued by the President June 27, 1898, established a blockade of all ports on the southern coast of Cuba between Cape Frances on the west and Cape Cruz on the east. Both Santiago and Guantanamo are to the eastward of Cape Cruz. Rear Admiral Sampson, however, on June 7, as commander of the naval forces, had ordered the investment of the ports of southern Cuba, and this investment was maintained as an effective blockade. The *Adula* was chartered by a Spanish subject, one Solis, from the Atlas Steamship Company, a British corporation, to bring refugees from Guantanamo, Santiago or Manzanillo, the voyage being primarily

a commercial one for personal profit. She sailed near the end of June from Kingston, Jamaica, and was overhauled by the *Vixen*. The American warships controlled Guantanamo Bay, from which the city is twenty-five miles distant. While it seems to have been accepted by the court that the city itself was still in the hands of the Spanish, it was contended by the defendants that the port was in the possession of the Americans. Justice Brown lays no stress on this contention in his decision, evidently being of the opinion that the blockading, or occupying, Americans — which they were — had in either event a perfect right to treat as hostile a vessel which was attempting to do a thing they conceived to be prejudicial to their interests. It may be added that the text writers of Europe almost unanimously accept the opinion that neutral ports occupied by the enemy are subject to blockade.

The fourth *dictum* of the Declaration of Paris, which is reaffirmed in Article 2, is too generally accepted to require any lengthy citations to demonstrate that it is law. It may be mentioned, however, that though the United States has never adhered to the Declaration officially, the maxim was cited as authoritative by Chief Justice Fuller in his decision in the case of the *Olinde Rodrigues* (1898) (174 U. S. 510, Scott's Cas. 835); and that the second of the instructions issued by the Secretary of the Navy, June 20, 1898, General Order No. 492, read: "A blockade to be effective and binding must be maintained by a force sufficient to render ingress to or egress from the port dangerous." The Declaration of Paris reads "to prevent access to the enemy coastline." We submit that the American phrasing might have well been embodied into the Declaration of London, referring to coastline instead of to a port.

That the question whether a blockade is effective is a question of fact is also a legal truism. One has only to refer to the decisions of Sir William Scott in the High Court of Admiralty (1 and 2 C. Robinson) and of the Right Hon. T. Pemberton Leigh (10 and 12 Moore's Privy Council) to see that the *de facto* blockade is well recognized in law. In fact, the phrase has lately fallen into disuse on account of the disposition to consider the one sort only; that is, those properly maintained. American and British jurists have also

recognized a blockade *de facto*, as one in which notification was not given. This tenet has been disputed on the Continent and Article 3 is a very satisfactory reconciliation of the two theories.

The effect of bad weather on a blockading force has long been acknowledged not to terminate the circumvallation. Article 4 has the sanction of British and American jurisprudence, though European opinions will have to be modified to a small extent. Dr. Lushington in the High Court of Admiralty in 1865 (*The Helen*, 1 L. R. 1 Ad. and Ecc. 1, Scott's Cas. 823), says: "The blockade must and (save accidental interruption by weather) be constantly enforced." Chief Justice Fuller in the *Olinde Rodrigues* quotes approvingly Sir William Scott in *The Hoffnung* (6 C. Rob. 112, 117):

When a squadron is driven off by accidents of weather, which must have entered into the contemplation of the belligerent imposing the blockade, there is no reason to suppose that such a circumstance would create a change of system, since it could not be expected that any blockade would continue many months without being liable to such temporary interruption.

The London conferees have satisfied themselves with stating simply that interruptions by stress of weather do not raise a blockade. They have by this phrasing steered clear of the extreme theory that a vessel making the closed port during this period of respite violates the blockade. This theory, according to Bonfils (§ 1645), is held by the courts of admiralty of Great Britain, Denmark and the United States. Besides the English writers Phillimore and Travers-Twiss, Bello, Brocher, Fiore and Kent subscribe to it. Ortolan, on the other hand, considers that weather exigencies suspend the blockade, while Bulmerincq and Halleck believe they operate to lengthen the duration of the investment.

France's learned text-writer evidently misunderstood the attitude of the Anglo-Saxon jurists, for Sir William Scott in the passage cited above continues (6 C. Rob. 117):

But when a squadron is driven off by superior force, a new course of events arise, which may tend to a very different disposition of the blockading force, and which introduces therefore a very different train of presumptions, in favor of the ordinary freedom of commercial speculations. In such a case the neutral merchant is not bound to foresee or to conjecture that the blockade will be resumed.

We submit that the point here made does not argue for a continuance of the blockade during the absence of the force from stress of weather so much as it does suggest that a neutral during such time acts at his own risk. It is well to note also that the enforced raising of a blockade is not mentioned in the chapter of the Declaration under review.

"A blockade must be applied impartially to the ships of all nations" reads Article 5, expressing an opinion upon which a minor point of the *Franciska* (1855) (10 Moore's Privy Council, 37, Scott's Cas. 804) depended. This vessel was ordered restored without costs to either party on appeal from a decree of condemnation. The circumstances were as follows: The commander of the Baltic fleet on April 5, 1854, blockaded the coast of Courland, but his notice to the British ministers conveyed the impression that all Russia's ports on the Baltic were blockaded. The British Government on that date issued an Order-in-Council giving Russian ships up to May 15 to discharge their cargoes from Russian ports in the Baltic and White Seas to their port of destination. A similar permission was granted by the French Government. The Russian authorities granted a like indulgence to British and French ships. On May 14, 1854, the *Franciska*, a neutral vessel, under Danish colors, sailed from Copenhagen to Riga and was captured off Riga by an English ship of war on May 23 for a breach of blockade of that port. The Right Hon. T. Pemberton Leigh in his decision, referring to relaxation of a blockade, quotes Grotius (*De Jure Belli ac Pacis*, lib. III. c. I, s. V.), Bynkershoek (*Quae. Jur. Pub.*, lib. I. c. II) and Vattel, all of whom agree with the latter who says (B. III, c. VII, s. 1, 17):

Quand je tiens une place assiégée, ou seulement bloquée, je suis en droit d'empêcher que personne n'y entre, et de traiter en ennemi quiconque entreprend d'y entrer, sans ma permission, ou d'y porter quoi que ce soit: car il s'oppose à mon entreprise, il peut contribuer à la faire échouer, et par là me faire tomber dans tous les maux d'une guerre malheureuse.

The prohibition is, of course, to secure absolute non-communication, which as Travers-Twisse remarks (II, 120) would not be obtained if a belligerent permitted its own ships to trade with the

blockaded port. Compare also the *Frederick Molke* (1 Rob. 87), the *Belsey* (1 Rob. 93), the *Vrouw Judith* (1 Rob. 151), the *Rolla* (6 Rob. 372), the *Success* (1 Dods. 134). It was this particular point that was contested in the War of 1812 when Great Britain proclaimed a paper blockade interdicting all neutral commerce but letting her own vessels enjoy the right of trade with the United States to the detriment of the neutrals themselves.

Article 6 in stipulating that "the commander of a blockading force may give permission to a warship to enter, and subsequently to leave a blockaded port" tends to avoid misunderstanding of a character illustrated in the schooner *Exchange v. McFaddon et al.* (7 Cranch 116; Scott's Cas. 208). Obviously the article refers to the warships of neutral powers and a waiving of jurisdiction over public warships by a non-belligerent is a well known principle. A public armed ship, says Chief Justice Marshall in the case involving the *Exchange*,

constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing these objects from being defeated by the interference of a foreign state. Such interference can not take place without affecting his power and dignity. The implied license, therefore, under which such vessel enters a friendly port, may reasonably be construed * * * as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality.³

At first glance the reference seems not to be applicable, but that is due only to the habitual attitude of considering, in the case of war, all states as divided simply into belligerents and neutrals. That division is perfectly proper from the point of view of those concerned in the conflict, which is the position one normally occupies when dealing with questions of war; but another division exists as clearly. Only in certain circumstances are states to be considered as neutrals and belligerents. Say, for instance, A and B are at war. Then C, D and E are neutrals in respect to the conflict, in relation to A and B together, as it might be put. But C is a friend of A and likewise at peace with B, with which A is at war. In the same

³ See JOURNAL, 3:235.

manner D's relations to A and B are perfectly friendly. And both, with E, possess, as Chief Justice Marshall said, a power and dignity and many and powerful motives for preventing their national objects from being interfered with by a foreign state. So the conferees at London could not presume to prohibit entry to and exit from a blockaded port to warships of friendly nations; and they very carefully phrased the article to indicate that such ingress and egress were to be considered, not as a right, but as a privilege.

Article 7 says:

In circumstances of distress, acknowledged by an officer of the blockading force, a neutral vessel may enter a place under blockade and subsequently leave it, provided that she has neither discharged nor shipped any cargo there.

This, from its very nature, has not been the subject of legal investigation. When the privilege is granted it is manifestly by an exception and for reasons convincing to the blockading officer. Therefore the article introduces no new principle, but it does provide in a very satisfactory manner for an exercise of humanity in a case which previously offered great uncertainty upon the point. Indeed, it is conceivable that without the special stipulation an officer might lay himself liable to court-martial for granting such a privilege. Such a possibility is now obviated in the case of all signatories.

Article 8. A blockade, in order to be binding, must be declared in accordance with Article 9, and notified in accordance with Articles 11 and 16.

Article 9. A declaration of blockade is made either by the blockading Power or by the naval authorities acting in its name.

It specifies:

- (1.) The date when the blockade begins;
- (2.) The geographical limits of the coastline under blockade;
- (3.) The period within which neutral vessels may come out.

Article 11. A declaration of blockade is notified:

(1.) To neutral Powers, by the blockading Power by means of a communication addressed to the Government direct, or to the representatives accredited to it:

(2.) To the local authorities, by the officer commanding the blockading force. The local authorities will, in turn, inform the foreign con-

sular officers at the port or on the coastline under blockade as soon as possible.

Article 16. If a vessel approaching a blockaded port has no knowledge, actual or presumptive, of the blockade, the notification must be made to the vessel itself by an officer of one of the ships of the blockading force. This notification should be entered in the vessel's logbook, and must state the day and hour, and geographical position of the vessel at the time.

The terms of these articles refer chiefly to the duties of the blockading force to neutrals. Admitted practice provides that the neutral shall not be constrained by the fact of war in his freedom of movement or the pursuits of his commerce any more than is necessary for the success of military operations. Being friendly to both parties, it is not proper that war should affect the neutral unduly with reference to his rightful activities; and it follows that he should be informed of any military condition that is likely to interfere with his full freedom of action. It is a question whether, legally speaking, the sovereign neutral or the sovereign belligerent has the preferred right, whether the belligerent can *de jure* issue prescriptions hampering the peaceful conduct by a state of its business, private or public. It is conceded in practice, however, that as war is an exceptional condition between states it carries with it exceptional privileges, primary among which is that of preventing non-belligerents from acting in such a manner as to interfere with its operations or the plans of its prosecutors. So any inhibition which war places upon a neutral is a matter of custom or provided by treaty and is not considered either legally or theoretically as an inherent right. Thus the common consent of states has made the doctrine of contraband possible.

It seems proper to point out here that while the Declaration of London everywhere views the rights of neutrals in this light, it nowhere makes any statement as to what legality is in respect to maritime trade in time of war. The Declaration takes pains to define where innocence ends and culpability begins, but that culpability is only an acquired condition respecting a belligerent it fails to state. Therefore we submit that it might have been well to have stated the principles contained in the following citations more definitely than by implication.

Compare the following:

Mr. Duer, "Marine Insurance," vol. 1, lect. VII., is the only text-writer who maintains an opinion contrary to what I have stated to be the law. He maintains it with ability and acuteness, but he stands alone. He himself admits that an insurance of a contraband voyage is no offense against municipal law of a neutral country, according to the practice of all the principal States of continental Europe. In the American courts the question has been more than once agitated, but with the same result. (Dr. Lushington, *The Helen*, 1865, L. R. 1 Ad. and Ecc. 1, Scott's Cas., 821.)

But there is nothing in our law or in the law of nations that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation (if taken by the belligerent aggrieved). (Justice Story, the *Santissima Trinidad*, 1822, 7 Wheat. 340; Scott's Cas. 701.)

But we do not know of any rule established by the law of nations that the neutral shipper of goods contraband of war, is an offender against his own sovereign, and liable to be punished by the municipal law of his own country. When a neutral sovereign is notified of a declaration of war, he may, and usually does, notify his subjects of it, with orders to decline all contraband trade with the nations at war, declaring that, if they are taken in it, he can not protect them, but not announcing the trade as a violation of his own laws. Should their sovereign offer to protect them, his conduct would be incompatible with his neutrality. And as, on the one hand, he can not complain of the confiscation of his subjects' goods, so, on the other hand, the power at war does not impute to him these practices of his subjects. A neutral merchant is not obliged to regard the state of war between other nations, but if he ships goods prohibited *jure belli*, they may be rightfully seized and condemned. It is one of the cases where two conflicting rights exist, which either party may exercise without charging the other with doing wrong. As the transportation is not prohibited by the laws of the neutral sovereign, his subjects may lawfully be concerned in it; and, as the right of war lawfully authorizes a belligerent power to seize and condemn the goods, he may lawfully do it. (Chief Justice Parsons, *Richardson v. The Marine Insurance Company*, 6 Mass. 112.)

The fact is that the law of nations does not declare the trade to be unlawful. It only authorizes the seizure of contraband articles by the belligerent powers. (Justice Kent, *Seton, Maitland & Co. v. Low*, 1799, 1 Johnson 5.)

The declaration of a blockade is a *sine qua non* of its existence. It is in accordance with the theory already expressed as to the rights

of a peaceful sovereignty during a state of war. Blockades are of relatively recent origin, dating only from the sixteenth century, but the first one recorded, that of Holland against the ports of Flanders in its war with Spain in 1584, was declared. The custom has ever since been an integral part of the establishment of a circumvallation about a coast or port. Notification is a natural concomitant of declaration. All legal decisions as to blockade have considered them as matter concerning which no discussion was necessary, and have been devoted simply to the questions arising from them.

Article 9 specifies that a declaration of blockade includes the date of its beginning, its limits and the period of grace for neutral vessels. It avoids, as does the whole chapter, any consideration of the question as to at what time in its *de facto* existence a state may resort to blockade. The omission was probably intentional inasmuch as the contracting powers would have no cause to agree as to the point as affecting themselves.

Courts have occasionally taken up the points dealt with in article 9, but in order to determine whether the case in point was affected by the provisions now incorporated in the Declaration. Thus the movements of the *Neptunus* (1799, 2 C. Robinson 110), the *Betsey* (1798, 1 C. Robinson 92a), the *Panaghia Rhomba* (1858, 12 Moore's Privy Council 168), the *Mercurius* (1798, 1 Rob. 80), the *Johanna Maria* (1855, 10 Moore's Privy Council 70), the *Franciska* (*ibid* 37), the *Frederick Molke* (1 C. Rob. 86)⁴ and other vessels at a later time have been examined to determine whether their delictions have preceded or antedated the declarations of blockade.

The geographical limits of the coastline affected by blockade has come to the fore in *The Gerasimo* (1857, 11 Moore's Privy Council 88; Scott's Cas. 811), the *Fama* (5 Rob. 115), the *Manilla* (1 Edw. 3), the *Adula* (1899, 176 United States 361; Scott's Cas. 826), and cases there cited.

"The period which is allowed for the exit of ships is usually fixed at fifteen days," says Hall (*Int. Law* 733), "and during this time vessels may issue freely in ballast or with a cargo *bona fide* bought and shipped before the commencement of the blockade. This

⁴ Scott's Cas. 796-811.

time was given in 1848 and 1864 by Denmark; by England and France during the Crimean war; by the United States during the Civil War, and by France in the war of 1870." The proclamation of President McKinley of April 22, 1898, doubled this period.⁵

The conferees at London had no cause to inquire thoroughly into the question of who may declare a blockade, for they were drawing up regulations primarily for themselves, all recognized Powers. They did not see fit in Article 9 to describe the conditions under which the naval authorities of a Power may declare a blockade, although that point seems to be very well settled. Nothing, however, in the article is at all contrary to the general principle that the right of establishing a blockade belongs to the executive power. "The executive power, the government, may delegate this right expressly to a particular authority, such as an admiral or commander of a squadron," says Bonfils (§ 1632), and cites Gessner, Phillimore, and Wildman. This delegation of authority is presumed in certain cases. If the commander of a squadron is operating in distant regions, he may be considered as virtually invested with all the powers necessary for the prosecution of the enterprise with which he is charged. This contention is disputed by many writers. It is admitted by others and by the practice of states generally. (Calvo, §§ 2828-2830). Another and better delegation in cases of forces remote from the central government is to make the declaration of blockade valid only "if the act of the commander is subsequently ratified by the central authority."⁶ Halleck makes still another distinction. He mentions a simple or actual blockade which is constituted merely by the fact of investment, and without any necessity of a public notification. As it arises solely from facts it ceases when they terminate. (Halleck, *Int. Law*, ch. 23, sec. 10.)

In the *Circassian* (2 Wall. 135, 150; Scott's Cas. 826), Chief Justice Fuller said:

⁵ Compare these state laws on the subject: France, 1838 and July 25, 1870; United States, May 24 and December 24, 1846, Seward's despatch, May 2, 1861, McKinley, April 22, 1898, 19 Richardson's Messages and Papers, 202; Denmark, February 16, 1864; Prussia, June 20, 1864; Turkey, May 3, 1877.

⁶ *Int. Law*, Wilson and Tucker, 316.

A simple blockade may be established by a naval officer, acting upon his own discretion or under direction of superiors, without governmental notification; while a public blockade is not only established in fact, but is notified, by the government directing it, to other governments.

This quotation is from the *Adula* (176 U. S. 361), in which Justice Brown continues:

A like ruling was made by Sir William Scott in the case of *The Rolla*, 6 C. Rob. 364, which was the case of an American ship and cargo, proceeded against for the breach of a blockade at Montevideo, imposed by the British commander. It was argued, apparently upon the authority of *The Henrick and Marie*, 1 C. Rob. 123, that the power of imposing a blockade is altogether an act of sovereignty which can not be assumed or exercised by a commander without special authority. But says the learned judge: "The court then expressed its opinion that this was a position not maintainable to that extent; because a commander going out to a distant station may reasonably be supposed to carry with him such a portion of sovereign authority, delegated to him, as may be necessary to provide for the exigencies of the service upon which he is employed."

It was not, of course, the intention of the contracting Powers to lay down rules relative to governments *de facto* or to insurgents. As blockade is a method of war which may be applied by whoever possesses the quality of belligerent, a government *de facto* not yet recognized as legitimate and regular may legitimately ordain a blockade, provided its belligerency has been recognized by other governments. As to insurgents, they seem not to enjoy the right of blockade. Says Prof. George Grafton Wilson:

The Institute of International Law, at its twentieth session in September, 1901, referring to the relation of a foreign power to an insurgent blockade, adopted the following resolution:

Tant qu'elle n'aura pas reconnu elle-même la belligérance elle n'est pas tenue de respecter les blocus établis par les insurgés sur les portions du littoral occupées par le gouvernement régulier.

It is unfortunate that the word blockade has ever been used by insurgents, as by the provisions of the Declaration of Paris, 1856, the word was definitely aimed to describe a war measure. A statement of the fact as supported by recent practice and opinion is that insurgents not yet recognized as possessing the attributes of full belligerency can not establish a blockade, according to the definition of international law.

There is no responsible body behind the insurgents.

An insurgent power is not a sovereign maintaining equal relations with other sovereigns, so that an insurgent proclamation of blockade does not rest on the same footing as one issued by a recognized sovereign power.
* * *

In a letter by Secretary Hay to the Secretary of the Navy, November 15, 1902, he said:

"To found a general right of insurgent blockade upon the recognition of belligerency of an insurgent by one or a few foreign powers would introduce an element of uncertainty. * * * Recognition of insurgent belligerency could merely imply the acquiescence by the recognizing government in the insurgent seizure of shipping flying the flag of the recognizing state. It could certainly not create a right on the part of the insurgents to seize the shipping of a state which has not recognized their belligerency."⁷

This statement of the case by one of the United States delegates to the Conference and the lecturer at the Newport Naval War College shows clearly enough why the Conference made no effort to draw distinctions too fine in the Declaration.

Article 11 regarding notification embodies principles, which, although familiar in practice, have played usually a minor part in legal decisions, owing, doubtless, to the circumstance that the question involved — the reality of notification — is one of fact easily determined from documentary evidence in a ship's log.

It offers an opportunity to distinguish between the several kinds of notification. Abroad the writers recognize diplomatic, or general, notification, which is made officially to the governments, and special notification, which is given by a ship of the blockading squadron to a vessel approaching the line of investment. Special notification, according to this definition, is provided for in Article 16, and therefore the terms of Article 11 apparently distinguish two kinds of diplomatic notification, the one to the government of the neutral powers direct, and the other to the authorities of the blockaded port. As it is enjoined upon these latter to inform the foreign consular officers of the port, ample provision is made to render diplomatic notification effective.

The article indicates a leaning in the Declaration toward the contention of such writers as Heffter and Wheaton, who maintain

⁷ JOURNAL, 1:56-57.

that a single notification is sufficient, diplomatic or special, according to circumstances (Bonfils, § 1650).

This is made clear in Article 16, where the notification to the vessel itself is dependent upon its knowledge, actual or presumptive, of the blockade. The rule tallies with the French regulation, except that France admits the right of the vessel to special notification even though the blockade has been publicly proclaimed. In the United States and England practice has considered actual knowledge of the blockade sufficient, so that the accepted rules are really an adoption of Anglo-Saxon practice. See *La Louisa* and *The Eliza Cornish* (1 Pistoye et Duverdy 382, 387).

The first paragraph of the article deals with a matter of frequent adjudication. Upon the matter of knowledge of the vessel depended the condemnation of the *Adula* (175 U. S. 361), in which the steamer started for the blockaded port of Guantanamo from Kingston, Jamaica, where knowledge of the blockade was common property. *Maryland Insurance Co. v. Woods* (6 Cranch 29) illustrates the situation by indirection, for although it was held that the vessel could not be placed in the situation of one having notice of the blockade until she was warned off, the decision was based upon the express ground that orders had been given by the British Government and communicated to the United States Government,

not to consider blockades as existing, unless in respect to particular ports which may be actually invested, and then not to capture vessels bound to such ports, unless they shall have been previously warned not to enter them.

A notice to the owner or charterer of a vessel was held sufficient to inform the vessel in *The Ranger* (6 C. Rob. 126); *The Yonge Emelia* (3 C. Rob. 52); *The Napoleon* (Blatch. Prize Cases 296). Permission to enter a blockaded harbor by a subordinate official of the blockading squadron was held invalid in *The Hope* (1 Dod. 226); *The Amado* (Newb. 400); *The Joseph* (8 Cr. 451); *The Benito Estenger* (8 Cr. 568). This point is borne out in the paragraph under consideration, for henceforth captains need follow only the entry on their own log and can disregard information of any

other character. The rule therefore ought to simplify matters to a considerable extent.⁸

The second paragraph of Article 16 softens the practice upheld in *The Prize Cases* (1862, 2 Black. 635), in which it was maintained that it is a settled rule that a vessel in a blockaded port is presumed to have notice of a blockade as soon as it commences. Compare *The Vrouw Judith* (1799, 1 O. Rob. 150). The Anglo-Saxon practice has been to permit a neutral vessel to pass outward. By the London rule this would seem to be a certain privilege only in case of failure to notify or omission of a time limit.

It is perhaps regrettable that international law as a whole has given so little textual consideration of such documents as passports, letters accrediting diplomats and recalling them, exequaturs, notifications of blockade and declarations thereof. One may read many a pretentious work on the general subject and even specific phases of it without once finding a sample of such a common document as an exequatur. It is safe to say that even in America, where legal documents are more generally studied than elsewhere by students, a large proportion of students of international law have never encountered the text of many of the formal documents of the science. This lack of definite familiarity with forms has been much more pronounced in the case of such men as shippers, whose curiosity as to the contents of forms of such a nature would naturally not be so intelligent. And as respects state papers regarding declaration and notification of blockade there have been no generally recognized rules as to what they shall contain. It may be said that the technical rules of pleading so far as international law is concerned are not thoroughly developed. Recent conferences have made advances along this line, and the London rules on blockade are particularly notable in this.

⁸ The French doctrine of special notification was adopted by the Council of State, is embodied in treaties and is expressed in the Instructions of July 25, 1870: "Si la France l'a (la notification spéciale) érigée en principe et s'y est toujours conformée, cela lui fait beaucoup d'honneur, car l'avertissement spécial amoindrit toujours les inconvénients de la guerre pour les neutres et coupe court à tous les abus du droit de blocus." Italy, by the Order of June 20, 1866, art. 7, and Sweden, by the Order of April 8, 1854, art. 4, admitted the necessity of special notification.

Thus, it may be said that Articles 9 and 10 deal with international law pleading. Article 10 reads:

If the operations of the blockading Power, or of the naval authorities acting in its name, do not tally with the particulars which, in accordance with Article 9 (1) and (2), must be inserted in the declaration of blockade, the declaration is void and a new declaration is necessary in order to make the blockade operative.

This provides for a situation analogous to that which in common law makes necessary a writ of error. It obviously is also in prevention of a paper blockade, for without the rule a warship patrolling a certain portion of coast might on occasion visit a distant section for the purpose of apprehending a vessel of presumable value to the enemy. In *The Franciska* the Rt. Hon. T. Pemberton Leigh just touched the point:

The notice of the blockade must not be more extensive than the blockade itself. A belligerent can not be allowed to proclaim that he has instituted a blockade of several ports of the enemy, when in truth he has only blockaded one; such a course would introduce all the evils of what is termed a paper blockade, and would be attended with the grossest injustice to the commerce of neutrals. Accordingly, a neutral is at liberty to disregard such a notice, and is not liable to the penalties attending a breach of blockade, for afterwards attempting to enter the port which really is blockaded.

The citation, though dealing only with a single aspect of the situation contemplated in the article under discussion, nevertheless agrees with the terms of the latter in asserting that in a case where the operations of the blockade fail to tally with its announcement, the blockade itself is void.

It seems well here to comment on the difference between declaration and notification, inasmuch as the learned judge uses the latter while the article employs the former. They are two manifestations of the same thing, and what distinction there is between them is indicated by the differentiation made in Roget's *Thesaurus*, where declaration may be found under the general head of affirmation and notification under information. Declaration is accordingly, although the authorities seem to be silent on the definition, a proceeding general in character and is expressly the act of the belligerent. Notifi-

gation, on the other hand, implies a recipient of the information and is therefore designed to convey definite facts to a single state, community or ship.

A hint of this distinction is given in Article 12, which says:

The rules as to declaration and notification of blockade apply to cases where the limits of a blockade are extended, or where a blockade is re-established after having been raised.

The phrasing here evidently considers declaration and notification in the light just set forth.

The rule itself is a contribution to the process of pleading, if so it may be called.

Notification of the voluntary raising of a blockade or any restrictions in its limits, provided for in Article 13, is in the same category. The *dictum* as to notification of discontinuance was assented to in *The Circassian* (2 Wall. 135), and text-writers accept the procedure without question as a duty owed by the belligerent creating the investment to trading neutrals.

Article 14. The liability of a neutral vessel to capture for breach of blockade, is contingent on her knowledge, actual or presumptive, of the blockade.

As pointed out above, the French theory of a special notification before liability begins receives scant recognition in these rules, and Article 14 sets at rest a fairly merry warfare of the text-writers. Four or five theories have been maintained. Gessner, Pistoye et Duverdy, Cauchy and Ortolan have held that liability is contingent only on double notification, by the diplomatic channel to the state and by means of a blockading officer to the vessel. Funck-Brentano and Sorel think the diplomatic notification sufficient. Perels and Boeck insist upon this notification as a necessary preliminary to any other informative action. Fauchille (*Du Blocus maritime* 218), Hautefeuille and Calvo consider the notification to the ship necessary and sufficient. Still others have set up the contention that no notification was necessary. And Heffter and Wheaton, with other American writers, have stipulated a single notification, its character being dependent on circumstances.

Now knowledge triumphs over technicality and two holdings of British and American courts receive recognition over a contrary practice pursued by France, Italy and Sweden.

In *The Franciska*, which came before the Privy Council in 1855, the judge said:

Notice has been imputed to the claimant in the court below from the alleged notoriety of the blockade on May 14 at Elsinore, where the ship touched, and at Copenhagen, where the owner resided. * * * The fact of knowledge is capable of much easier proof in the case of ingress than in the case of egress; but when once the fact is clearly proved, the consequences must be the same. The reasoning of the learned judge of the court below in this case and the language of Lord Stowell in *The Adelaide* reported in the note to *The Neptunus*, 2 Rob. 111, and *The Hurlig Hane*, 3 Rob. 324, are conclusive upon this point.

But while their lordships are quite prepared to hold that the existence and extent of a blockade may be so well and so generally known that knowledge of it in an individual may be presumed without distinct proof of personal knowledge, and that knowledge so acquired may supply the place of a direct communication from the blockading squadron, yet the fact, with notice of which the individual is to be fixed, must be one which admits of no reasonable doubt. "Any communication which brings it to the knowledge of the party," to use the language of Lord Stowell in *The Rolla*, 6 Rob. 367, "in a way which could leave no doubt in his mind as to the authenticity of the information."

Again, the notice to be inferred from general notoriety, must be of such a character that if conveyed by a distinct intimation from a competent authority it would have been binding. The notice can not be more effectual because its existence is presumed, than it would be if it were directly established in evidence. The notice to be inferred from the acts of a belligerent, which is to supply the place of a public notification, or of a particular warning, must be such as, if given in the form of a public notification, or of a particular warning, would have been legal and effectual. •

Because the notorious knowledge as to the blockade was wrong in this instance the vessel was released. The late American case dealing with a similar situation is *The Adula* (176 U. S. 361, Scott's Cas. 826) and cases there cited.

Article 15. Failing proof to the contrary, knowledge of the blockade is presumed if the vessel left a neutral port subsequently to the notification of the blockade to the Power to which such port belongs, provided that such notification was made in sufficient time.

* The presumption here is provided with an interesting sidelight from a series of treaties which the United States has negotiated with Bolivia, Brazil, Colombia, Haiti, Italy, Prussia and Sweden and Norway.⁹ Article XVI of the treaty of commerce and navigation with Greece, Dec. 22, 1837; Article XIII of the treaty of commerce and navigation with Prussia, May 1, 1828, and Article XVIII of the treaty of commerce and navigation with Sweden and Norway, July 4, 1827, are identic and read:

Considering the remoteness of the respective countries of the Two High Contracting Powers, and the uncertainty resulting therefrom with respect to the various events which may take place, it is agreed that a merchant vessel, belonging to either of them, which may be bound to a port supposed, at the time of its departure, to be blockaded, shall not, however, be captured or condemned for having attempted, a first time, to enter said port, unless it can be proved that said vessel could, and ought to, have learned, during its voyage, that the blockade of the place in question still continued. But all vessels which, after having been warned off once, during the same voyage, attempt, a second time, to enter the same blockaded port, during the continuance of said blockade, shall then subject themselves to be detained and condemned.

Article 20 of the treaty of peace, friendship, commerce and navigation with Bolivia, May 13, 1858; Article 19 of the treaty of amity, commerce and navigation with Brazil, Dec. 12, 1828; Article 20 of the treaty of peace, amity, navigation and commerce with New Granada (Colombia), Dec. 12, 1846; Article 18 of the treaty of amity, commerce and navigation and extradition with Haiti, Nov. 1, 1864, and Article XIV of the treaty of commerce and navigation with Italy, Feb. 26, 1871, are constructed on the same basis and read as follows: . . .

And whereas it frequently happens that vessels sail for a port or a place belonging to an enemy, without knowing that the same is besieged, blockaded or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place, but shall not be detained, nor shall any part of her cargo, if not contraband of war, be confiscated, unless after a warning of such blockade or investment¹⁰ from an officer

⁹ See *Treaties in Force*, 1904, pp. 94, 111, 200, 398, 419, 453, 647, and 760.

¹⁰ The text of the article here given is that of the Italian treaty. The text is to the same intent to the "unless," from which for a few lines the following variations occur: Bolivia, "unless, after warning of such blockade or invest-

commanding a vessel of the blockading forces, by an endorsement of such officer on the papers of the vessel mentioning the date, and the latitude and longitude where such endorsement was made, she shall again attempt to enter; but she shall be permitted to go to any other port or place she shall think proper.¹¹ Nor shall any vessel of either that may have entered into such a port before the same was actually besieged, blockaded or invested by the other, be restrained from quitting such place with her cargo, nor, if found therein after the reduction and surrender, shall such vessel or her cargo be liable to confiscation, but they shall be restored to the owners thereof;¹² and if any vessel, having thus entered any port before the blockade took place, shall take on board a cargo after the blockade be established, she shall be subject to being warned by the blockading forces to return to the port blockaded, and discharge the said cargo, and if after receiving the said warning, the vessel shall persist in going out with the cargo, she shall be liable to the same consequences as a vessel attempting to enter a blockaded port, after being warned off by the blockading forces.

Citations elsewhere¹³ indicate the correctness of the principle involved in Article 15 of the Declaration, and the ideas embodied in the treaties just quoted are an interesting exception, and may be said to prove the rule, for it required special and solemn agreements to render them effective. The statement agreed to by the United States Government with Greece, Prussia, Sweden and Norway involves a courtesy and leniency one could not expect to see incorporated into a multipartite agreement such as the Declaration of London. It virtually means that a vessel is entitled in certain circumstances to a second warning before being liable to capture or detention. The provision, which was negotiated with Sweden and Norway jointly, is in force in respect to each separately.¹⁴

ment, from any officer commanding a vessel of the blockading forces, they shall again," etc.; Brazil, "unless, after warning of such blockade or investment from any officer commanding a vessel of the blockading forces, she shall again," etc.; Colombia, "unless, after warning of such blockade or investment, from the commanding officer of the blockading forces, she shall again," etc.; Haiti, "unless, after notice of such blockade or investment, she shall again," etc.

¹¹ Added here in the treaty with Haiti is the phrase, "provided the same be not blockaded, besieged or invested."

¹² The treaties with Bolivia, Colombia, and Haiti end here. The treaty with Brazil continues in the words of the treaty with Italy, which is quoted above textually, except that the phrase "the port" is employed instead of "any port," probably a change due to the translator only.

¹³ See *ante* under Article 16.

¹⁴ See U. S. Foreign Relations, 1905, 867-874. The Japanese minister in a

Article 18 says:

The blockading forces must not bar access to neutral ports or coasts.

This statement must be read as not including neutral ports or coasts occupied by the enemy, for by the doctrine of hostile occupation, in that case, they cease to be neutral. Compare *United States v. Rice* (4 Wheaton, 246); *United States v. Hayward* (2 Gall. 485); *American Insurance Co. v. Canter* (1 Peters, 541); *Cross v. Harrison* (16 How. 164); *Fleming v. Page* (9 How. 603); *Jecker v. Montgomery* (13 How. 498); *Villasseque's Case* (Ortolan I, 324); *Elector of Hesse Cassel's Case* (Phillimore III, 841; Magoon, *Military Occupation*, 262).

Article 17. Neutral vessels may not be captured for breach of blockade except within the area of operations of the warships detailed to render the blockade effective.

Article 19. Whatever may be the ulterior destination of a vessel or of her cargo, she can not be captured for breach of blockade, if, at the moment, she is on her way to a non-blockaded port.

Article 20. A vessel which has broken blockade outwards, or which has attempted to break blockade inwards, is liable to capture so long as she is pursued by a ship of the blockading force. If the pursuit is abandoned, or if the blockade is raised, her capture can no longer be effected.

It looks from these rules as to capture as if practice would have to give way. Articles 17 and 19 read together stipulate that neutral vessels may be captured only within the area of operations of the blockading squadron and that a vessel, neutral or otherwise, cannot be captured if, at the moment, she is on her way to a non-blockaded port. Strictly speaking, the provisions should put an end to the

memorandum of November 9 inquired of Secretary Root as to the validity of treaties negotiated by Sweden and Norway previous to their separation on June 7 as to other Powers and toward each severally. Secretary Root in his reply said: "This government would regard the treaty provisions in regard to Norway and Sweden as severally binding upon each country and unaffected by the dynastic change in Norway. In point of fact, the Government of Norway and the Government of Sweden have hitherto acted independently in execution of their treaty engagements, each within its sovereign jurisdiction." Declarations in notes from the Swedish minister on November 20 and from the Norwegian on December 7 confirmed this opinion.

practice defined as continuous voyage, for they bar the capture of a neutral vessel before she has touched at the intermediate port or ports. If this reasoning is correct, the American and British delegates gave way in this instance to the European theory, which is that the Anglo-Saxon view annihilates the liberty of the sea and the free commerce of neutrals, leading the blockading state to declare itself master of the ocean and to place the entire commerce of the world at the mercy of the belligerents.¹⁵

British and American contraband cases, involving blockade, are fairly numerous in which ships were taken before reaching the intermediate port. *The Peterhoff* (5 Wall. 28, 58) had not yet reached Matamoras on an ostensible contraband voyage when taken; *The Stephen Hart* (Blatch. Prize Cases, 387) was taken on a declared voyage from London to Cardenas; *The Dolphin* (7 Fed. Cas. 864), *The Pearl* (19 Fed. Cas. 54, 5 Wall. 578), *The Bermuda* (3 Wall. 514) and *The Springbok* (5 Wall. 1) were captured during the Civil War on the voyage from Liverpool to Nassau.¹⁶ In all of these the continuous voyage was held to place the vessel *in delictu*, and Sir William Scott's decision in *The Imina* (1800, 3 C. Rob. 138) is sometimes considered as being at variance with the customary Anglo-Saxon rule.¹⁶ In that case, however, he definitely states:

The rule respecting contraband, as I have always understood it, is that the articles must be taken *in delictu*, in the actual prosecution of the voyage to an enemy's port. * * * From the moment of quitting port on a hostile destination, indeed, the offence is complete, and it is not necessary to wait till the goods are actually endeavoring to enter the enemy's port; but beyond that, if the goods are not taken *in delictu*, and in the actual prosecution of such a voyage, the penalty is not now generally held to attach.

The vessel itself sailed from Dantzic for Amsterdam, but was going at the time of the capture to Embden in consequence of information of the blockade of Amsterdam. Because of that circumstance

¹⁵ Arntz, Asser, Bulmerincq, Calvo, Gessner, Hall, Vernon Harcourt (Historicus), Geffcken, Lawrence, Phillimore, Travers-Twiss, Westlake, de Boeck, and Fauchille have condemned the American practice. See Gessner, *Le droit des neutres*, 230; Travers-Twiss, II. 117, and *La theorie de la continuite du voyage*, Paris, 1877; de Boeck, *De la propriete*, 175; Fauchille, 133 *et seq.*; Geffcken's Heffter, 50, note 9, for Continental discussions of the point.

¹⁶ See JOURNAL, 1:73-74.

the learned judge, afterward Lord Stowell, concluded that the change of destination had caused the vessel's guilt to cease.

Articles 17 and 19 draw a fine, and it seems to the writer, a proper distinction between the treatment of the neutral vessel and any other, whether of the blockading state, of the enemy or, in the case of blockade of an occupied port, of a vessel belonging in that port. The neutral vessel is made liable to capture only within the area of the blockading squadron's operations, beyond which, either in the case of attempted ingress or egress, she can consider herself safe, provided the pursuit has not begun within the area of blockade. The two articles in question, to be sure, are not exactly intended to deal precisely with the same condition, but there is nothing evident in their wording which precludes such a conclusion to be drawn and the line of speculation just set down is given as a hint of a possible complication that might arise.

Viewed separately, each is an excellent statement of the principle involved. The obvious intention of Article 17 is to say that a neutral vessel is liable to capture only while *in delictu*, and Article 19 is evidently a blow at the Anglo-Saxon *dictum* that a vessel is subject to apprehension at any time during a continuous voyage. It embodies the decision in *The Imina* more nearly perhaps than the stricter European theory.

Article 20 is a compromise between Anglo-Saxondom and Europe. German, Spanish, French, and Italian writers have in general agreed that a vessel may be seized when traversing or attempting to traverse the line of investment, in the port blockaded, or at the moment of attempted egress. They add that if the neutral vessel, when it seeks to violate a blockade, is pursued by a vessel of the investing squadron and tries to escape by flight, it may be pursued and captured on the high seas, before its entry into a port or jurisdictional waters of a neutral state.¹⁷ English and American jurists and writers, on the other hand, maintain that the vessel is not safe from pursuit until she has reached her port of destination and that putting into an intermediary port, either through force or voluntarily, does not

¹⁷ See Hautefeuille, *Droits et devoirs des nations neutres*, tom. II, p. 225; Fauchille, *op. cit.*, p. 355; Gessner, *Le droit de neutres sur mer*, p. 228; Spanish decree, November 26, 1864, art. 6; Perels, *Manuel de droit maritime*, p. 307.

efface the liability. Pursuit, by the terms of the Declaration, must now be continuous to be effective. Whether it would be held a continuous pursuit if a vessel in flight made an intermediary port safely only to issue forth and fall into the power of a warship of the blockading squadron which had followed and waited continuously, is a question that must await adjudication to be answered. It is probable, if the court were a state one, the decision would depend largely upon the nationality of the judge.

Article 21. A vessel found guilty of breach of blockade is liable to condemnation. The cargo is also condemned, unless it is proved that at the time of the shipment of the goods the shipper neither knew nor could have known of the intention to break the blockade.

The liability of vessel and cargo to condemnation is admitted in "tous les traites pendant le XIX^e siècle."¹⁸ The principle is admitted in the regulations of Denmark, February 16, 1864; Prussia, June 20, 1864; Spain, November 26, 1864; Italy, June 20, 1866; Austria, July 9, 1866, etc. *The Panaghia Rhomba* case (12 Moore's Privy Council 168, Scott Czs. 800) came up on that question, and it was held both originally and on appeal that "the owners of the cargo are concluded by the illegal act of the master (of the vessel), though it may have been done without their privity, and even contrary to their wishes." The rule involved was declared by the Rt. Hon. T. Pemberton Leigh to be "established by authority not now to be questioned."¹⁹ The affirmation in that judgment half a century ago could scarcely be made in its entirety in accordance with the Declaration of London, but the latter certainly leaves the burden of proof upon the owner of the cargo.

In conclusion, a word is worth saying in compliment to the framers of the London rules on blockade. Working as they did under the constant necessity of compromising issues, they produced a set of regulations that is exceptionally complete and truly does "note, define and complete what might be considered customary law."

DENYS P. MYERS.

¹⁸ Bonfils, *Manuel*, § 1671, p. 976,

¹⁹ Cf. the cases there cited: *The Mercurius*, 1 Rob. 80 (1798); *The Alexander*, 4 Rob. 94 (1801); *The Adonis*, 5 Rob. 259 (1804); *The Exchange*, 1 Edward's Rep. 42 (1808); *The James Cook*, *ibid.* 261 (1810).

THE HISTORY OF THE DEPARTMENT OF STATE

VI

SUBDIVISIONS OF THE DEPARTMENT

I

When the old government gave place to the new in 1789 the state papers of the old Congress were placed in the hands of Roger Alden and Henry Remsen, the former having those which related to domestic affairs, the latter those relating to foreign affairs.¹ The papers were turned over to the Secretary of State when his department was created, excepting those pertaining to the Treasury and War Departments which were delivered to the heads of those departments. (Sec. 7, Act of September 15, 1790.) When John Jay assumed temporarily the direction of the Department of State he put Remsen in charge of the foreign affairs of the Department and Alden in charge of its domestic duties; and when Jefferson entered upon the office of Secretary of State he confirmed this arrangement, and the heads of these subdivisions held equal rank. His estimates for the expenses of his Department in 1790 were for "The Home Office" and "The Foreign Office;" but after Alden's resignation on July 25 of that year the arrangement of a single chief clerk, which the law had originally contemplated, was effected, and the two divisions of the Department were merged under Remsen.² In 1802 William Thornton was put in charge of the Patent business of the Department and that became the first distinct and permanent subdivision. He took the title of Superintendent soon after his appointment, but there was no statutory recognition of the designation until the appropriation act of 1818 provided for his salary as superintendent.³ The first specific appropriation for the salaries

¹ Am. Journal of Int. Law, July, 1908, p. 605.

² Am. Journal of Int. Law, January, 1909, p. 147.

³ 3 Stat. 445.

of the secretary and officers (clerks) of the Department was for the year 1792 and amounted to \$6,300;⁴ for 1793 it was \$8,150;⁵ for 1794, \$9,661.67;⁶ for 1795, \$11,721.79.⁷ The compensation of the chief clerk had been fixed by law at \$800, but the Act of 1794 gave him an additional allowance of \$200.⁸ No clerk could be paid more than \$500 under the law, until the Act of 1795 permitted the Secretaries of State, Treasury, and War to vary the compensation according to the services performed, keeping the whole expenditure within the appropriation, but no chief clerk was to receive more than \$1,000.⁹ In 1797 the appropriations had risen to \$16,497.64.¹⁰ In 1799 the salary of the Secretary was increased to \$5,000,¹¹ and in 1801 there was an appropriation of fifteen per cent over the amount appropriated in 1799 to the clerks in the several departments.¹² Following this provision, on June 25, 1801, the clerks addressed Secretary Madison asking him to apportion the extra allowance among them.¹³ The extra allowances occasionally provided by law were the only compensation received by the clerks beyond their regular salaries, and the custom which prevailed in England among the clerks in the Foreign Office of receiving pecuniary gifts from foreign ministers never became the practice in Washington. The expectations of such gifts in London are indicated by the following letter to Rufus King, American Envoy at London, dated January 15, 1800:

The Clerks of the Foreign Office present their respects to Mr. King and have taken the liberty of directing the Bearer Mr. Turner to wait upon His Excellency for the Christmas gratuity usually given to them by the Foreign Ministers.¹⁴

⁴ 1 Stat. 226.

⁵ 1 Stat. 327.

⁶ 1 Stat. 342.

⁷ 1 Stat. 406.

⁸ 1 Stat. 392.

⁹ 1 Stat. 443.

¹⁰ 1 Stat. 498.

¹¹ 1 Stat. 729.

¹² 2 Stat. 117, 119.

¹³ Madison Papers, Library of Cong. MSS.

¹⁴ Dept. of State, MSS., Passport Letters, I.

As the organic act of the Department provided that the chief clerk should be appointed by the head of the Department (Sec. 2, Act of July 27, 1789), so were the inferior clerks appointed by him and directly responsible to him. The power of the President as the head of the executive branch of the government was not interfered with by this arrangement, however, as he might still direct the secretary to appoint or remove clerks whenever he should choose to do so. This power has been exercised freely by some Presidents and not at all by others, the frequency and extent of the use depending upon the varying dispositions of Presidents and circumstances which seem to call for the exercise of the power. Two examples will suffice to illustrate.

The first is from Andrew Jackson:

The President with his respects to the Secretary of State, begs leave to draw his attention to a regulation adopted by the President at the commencement of his administration, to wit, that where any officer under the Government contracted debts and failed to pay them, but took the benefit of the insolvent debtors act, he should be forthwith removed — report has been made that such violations of the rule has been made in the patent office; you will cause the necessary inquiries to be made, in your Department, and report the same to me, that such clerks may be removed — The enquiry will only be to debts contracted under the present administration and not before.

*August 1st, 1831.*¹⁵

WASHINGTON, *August 6, 1831.*

Sir:

Lemuel W. Ruggles Esq., clerk in the "Patent Office," is hereby dismissed from office as it has been reported to me that he has taken the benefit of the Insolvent Debtors' Act for debts contracted *during* my administration. The heads of Departments are charged to report all clerks, who are guilty of the same conduct, to the President for dismissal.

Very Respectfully,

Secretary of State.¹⁶

ANDREW JACKSON.

A second example was furnished in 1835 when Thomas F. Bayard, the Secretary of State, required the chief clerk, Sevellon A. Brown, to resign, saying that the President had directed him to make the request.

¹⁵ Papers from the President, 1825 to 1832, Dept. of State, MSS.

¹⁶ Papers from the President, 1825 to 1832, Dept. of State, MSS.

The executive staff of the Department in 1790 has already been given in a previous number of the JOURNAL.¹⁷ It varied little from year to year, separations from the service being few. In 1800, with the annual salaries received, it was as follows:

John Marshall, Secretary.....	\$5,000
Jacob Wagner, Chief Clerk.....	1,500
Hazen Kimball, Clerk.....	900
Joseph Dennie, Clerk.....	800
Christopher S. Thorn.....	650
John C. Miller.....	600
Stephen Pleasonton.....	600
William Crawford.....	600
John N. Smith, Clerk.....	500
John Lee, Messenger.....	350

Total..... \$11,500¹⁸

The Act of April 21, 1806,¹⁹ required the Secretary of State to report to Congress at the beginning of each year the names of the clerks employed and the sums paid each; and this report of the Secretary also indicated the duties performed by each.

REPORT.

IN pursuance of the act of Congress, entitled "An act to regulate and fix the compensation of clerks," &c. the secretary of state has the honor to report to Congress, the annexed list of the persons employed in his office, and to state that the business of the department generally is in a state of progressive increase; that particularly the business relating to patents issued for useful arts, has increased at the rate of doubling in four years; and that patents for lands, and the business attending the impressment of American seamen, have also much increased. It is his opinion, therefore, that the public service would be promoted by a provision, at least sufficient for the employment of an additional clerk.

All which is respectfully submitted.

JAMES MADISON.

Department of State, }
January 1, 1807. }

¹⁷ January, 1909, p. 148.

¹⁸ Madison Papers, Library of Congress, MSS.

¹⁹ 2 Stat. 397.

List of the names and compensation of the persons employed in the Department of State, in the year 1806, viz.

Mr. WAGNER, \$2,000.

The chief clerk distributes the business among the others, and superintends its execution, under the direction of the secretary. His active duties are diversified according to the nature and pressure of the general business of the department; and among them may be particularized his assistance in its correspondence upon minor subjects.

Mr. BRENT, \$1,000.

In conjunction with Mr. Smith, he attends to the business of impressed seamen, and assists in collating the laws preparatory to their publication, which he superintends.

Mr. THOM, \$881.

Makes out and records Virginia military land patents; pays the awards under the seventh article of the British treaty, so far as they are payable in the department, and keeps the contingent accounts of the department.

Mr. PLEASANTON, \$906.

Makes out and records patents for military bounty lands; for lands in John Cleves Simmes' tract; exequaturs for consuls; all civil commissions, and commissions for militia officers within the district of Columbia; records the correspondence with our ministers in foreign countries, and transmits the laws to the printers for promulgation.

Mr. SMITH, \$800.

Records all the correspondence, except that with the ministers abroad, and in conjunction with Mr. Brent, attends to the business relative to impressed seamen, and to collating the laws, previous to their publication.

Mr. FORREST, \$800.

Makes out and records patents for lands sold under the direction of the registers; and also, passports for citizens going abroad. His knowledge of the French language, which he speaks, is found an useful quality.

Mr. I. GARDNER, for occasional service in filling up and record-
ing land patents, } \$25

Among other business too various to be detailed, there is a considerable quantity of copying, particularly of correspondence with our ministers and agents abroad, frequently including voluminous documents: This is performed by the gentlemen of the office, according to the state of their other engagements, without its being the stationary business of any.

PATENTS AND COPY-RIGHTS.

For services rendered by Dr. Thornton, in superintending and issuing patents for useful inventions and discoveries; in securing copy-rights, &c. &c. a compensation has been allowed him of \$1,400.

Jacob Wagner had been appointed chief clerk when Remsen resigned in 1792, having been selected, as Jefferson explained, because he was the senior clerk in the Department and was familiar with its duties.²⁰ No political considerations influenced his selection, nor did they effect his removal. He was a federalist of the extreme type and his views were known. On November 20, 1801, William P. Gardner informed the President of Wagner's political opinions and the letter was sent to Madison, but Wagner remained in office until March 31, 1807. After his retirement he joined the opposition actively and edited the *North American and Mercantile Daily* in Baltimore in 1808, which in the following year became the *Federal Republican*, one of the most violent of the anti-administration organs. The press was destroyed by a mob June 22, 1812.²¹

For his successor the Secretary went outside of the Department staff for the first time, and selected a personal friend in John Graham, who had been Secretary of Legation and Charge d'Affaires at Madrid from 1801 to 1804. He held the chief clerkship from July 1, 1807, to July 18, 1817, when he was appointed Commissioner to Buenos Ayres. When Madison left the presidency he sent a letter to his successor commending Graham and explaining how he had entered the State Department:

WASHINGTON, *Mar.* — 1817.

Dear Sir: •

Altho' your personal and official acquaintance with Mr. J. Graham, be well known to me, I can not, on the occasion of my final departure from the public service, satisfy myself, without expressing my sense of his great merit.

Mr. Graham, recommended by my knowledge of his public agency abroad, and of his private virtues, was invited into the Department of State, as the chief under the Head of it, whilst the Department was in

²⁰ Jefferson to William Barton, April 1, 1792. Writings (P. L. Ford), V., 491.

²¹ Scharf's *Chronicles of Baltimore*, 88, 315.

my hands. It was my wish, more than his own that was gratified by his appointment. And I have always considered it as the effect of an honorable desire to serve his country, combined with his personal and political feelings, that he remained for so long a period, in a station without the attractions, which could otherwise have detained him in it.

On these grounds, and from continued and varied opportunities of being intimately acquainted with Mr. Graham, I not only take a pleasure, but feel an obligation, in saying that I regard him as among the most worthy of men, and most estimable of citizens; as adding to a sound and discriminating judgment, a valuable stock of acquirements adapted to public affairs; and to both, a purity of character, a delicacy of sentiment, and an amenity of temper and manners, exceeded in no instance to which I could refer.

With this view of his capacity to be useful to his country and the principles guarantying a proper exertion of it, I can not but hope that suitable occasions may present themselves for preventing a loss to the public of the services of a citizen, so highly entitled to its confidence.

With the highest consideration &
regard, I remain
Yours

JAMES MADISON.

The President of the U. S.²²

During Jacob Wagner's incumbency as chief clerk, there were destructive fires in the buildings occupied by the Treasury, War, and State Departments; but he saved the records of his Department.²³ His successor, John Graham, was one of several who saved them again from fire and possibly from a worse fate than fire.

The serious danger of capture of the city of Washington in the second year of the War of 1812 was realized by no one more keenly than by the Secretary of State, James Monroe. As President Madison had confidence in his military skill he was encouraged to make a personal investigation of the advance of the enemy towards the city in the summer of 1814, and he left the city for that purpose on the evening of August 19.

On the following day he saw the British forces from an eminence near Benedict and at once sent a note by a vidette to his department directing the officers to save the records. The next day John Graham, Stephen Pleasonton, and Josiah King packed them in bags

²² Dept. of State, MSS. Misc. Letters, Vol. 55.

²³ Madison Papers, Library of Congress, MSS.

prepared for the purpose.²⁴ Mr. Pleasonton told the story many years afterwards.

Whereupon, he says, I proceeded to purchase coarse linen, and cause it to be made into bags of convenient size, in which the gentlemen of the office, assisted by me, placed the books, and other papers, after which I obtained carts, and had them conveyed to a grist mill, then unoccupied, belonging to Mr. Edgar Patterson, situated a short distance on the Virginia side of the Potomac, beyond the Chain bridge, so called, two miles above Georgetown.

Whilst engaged in the passage of the building with the papers, the Department of State being on one side, and the War Department on the other side of the passage, General Armstrong, then Secretary of War, on his way to his own room, stopped a short time, and observed to me, that he thought we were under unnecessary alarm, as he did not think the British were serious in their intentions of coming to Washington. I replied that we were under a different belief and let their intentions be what they might, it was the part of prudence to preserve the valuable papers of the Revolutionary Government, comprising the Declaration of Independence, the laws, the secret journals of Congress, then not published, the correspondence of General Washington, his commission resigned at the close of the war, the correspondence of General Greene and other Generals, as well as all the laws, treaties, and correspondence of the Department of State since the adoption of the Constitution down to that time.

Considering the papers unsafe in the mill, as if the British forces got to Washington, they would probably detach a force for the purpose of destroying a foundry for cannon and shot in its neighborhood, and would be led by some evil disposed person to destroy the mill and papers also, I proceeded to some farm houses in Virginia, and procured wagons in which the books and papers were deposited, and I proceeded with them to the town of Leesburg, a distance of 35 miles, at which place an empty house was procured, in which the papers were safely placed, the doors locked, and the keys given to the Rev. Mr. Littlejohn, who was then or had been, one of the collectors of internal revenue.

Being fatigued with the ride, and securing the papers, I retired early to bed, and was informed next morning by the people of the hotel where I staid, that they had seen, the preceding night, being the 24th of August, a large fire in the direction of Washington, which proved to be a light from the public buildings the enemy had set on fire, and burned them to the ground.

On the 26th August I returned to Washington, and found the President's house and public offices still burning, and learned that the British army had evacuated the city the preceding evening, in the belief that our forces were again assembling in their rear, for the purpose of cutting off their retreat. * * *

²⁴ National Intelligencer, June 10, 1867.

As a part of the British fleet soon afterwards ascended the Potomac, and plundered Alexandria of a large quantity of flour and tobacco, threatening Washington at the same time with a second invasion, it was not considered safe to bring the papers of the State Department back for some weeks. Not, indeed, until the British fleet generally had left the waters of the Chesapeake. In the meantime, it was found necessary for me to proceed to Leesburg occasionally, for particular papers, to which the Secretary of State had occasion to refer in the course of his correspondence.²⁵

The record is silent on the subject of the disposition made of the Great Seal at this time, and apparently it was not taken with the archives. Certain it is, however, that it escaped injury, for it must have been affixed to the President's proclamation on the subject of the capture of the city, dated September 1, before the Department's archives had been brought back to Washington. No effort was made to remove the models of the Patent Office; they were too numerous and too bulky to justify the attempt; but the day before the entrance of the British into the city Dr. Thornton removed the records to his farm three miles north of the city; and when the work of destruction by the enemy was in progress he successfully interceded with the British officers to abandon their purpose of burning the models of inventions useful to mankind.²⁶

An official report on the saving of the records was made by Secretary Monroe on November 17:

Report of the Secretary of State, of the loss of books, papers, &c. occasioned by the incursion of the enemy in the month of August 1814; made pursuant to an order of the house. November 17, 1814. Read, and ordered to lie on the table.

THE acting secretary of state, in compliance with the resolution of the house of representatives of the 24th ult. requesting such information as may be in the power of the several departments to afford, in relation to the destruction of official books and papers in their departments, respectively, in consequence of the incursion of the enemy in the month of August, 1814, has the honor to report:

That when it became apparent from the movements of the enemy, after his debarkation at Benedict, that his destination was the seat of government, every exertion was made, and every means employed, for the removal of the books and papers of this office, to a place of safety; and

²⁵ Samuel Pleasonton to W. H. Winder, Jr., August 7, 1848. E. D. Ingraham's *A Sketch of the Events which preceded the Capture of Washington*, Philadelphia, 1849.

²⁶ Thornton Papers, Library of Congress, MSS.

notwithstanding the extreme difficulty in obtaining the means of conveyance, it is believed, that every paper and manuscript book of the office, of any importance, including those of the old government and all in relation to accounts, were placed in a state of security. That it was not found practicable, however, to preserve in like manner, the volumes of laws reserved by congress for future disposition; many of the books belonging to the library of the department, as well as some letters on file of minor importance from individuals on business mostly disposed of, which were unavoidably left, and shared the fate, it is presumed, of the building in which they were deposited.

All which is respectfully submitted,

JAMES MONROE.

Department of State,
November 14, 1814.

The injuries actually inflicted upon the official records at Washington through the capture of the city by the British have been stretched to cover a multitude of losses from other causes. So far as the State Department is concerned, the vigilance of Monroe and of Pleasonton and his colleagues prevented any destruction of important irreplaceable archives. That they deserve public gratitude for this will be realized if the mind is permitted to imagine the indelible shame which would have followed if they had been less loyal and resourceful and Cochran and Ross had carried away with them, as trophies of their exploit, the rolls of the Declaration of Independence and the Constitution of the United States.

When Graham retired as chief clerk his place was taken on April 21, 1817, by Daniel Brent, and John Quincy Adams entering upon the duties of Secretary of State on September 22 of that year confirmed the assignment because of Brent's previous service in the Department.²⁷

There were still no subdivisions in the Department, except so far as the Patent Office was one. Adams found the correspondence in great confusion because of the want of system, and introduced certain improvements in registering and indexing incoming and outgoing mail. The business had greatly increased; the force of the Department had been enlarged; the salaries were higher. In 1820 the officers and salaries were:

²⁷ John Quincy Adams' Diary, IV., 9.

John Quincy Adams, Secretary of State....	\$6,000	per annum
Daniel Brent, Chief Clerk.....	2,000	" "
Richard Forrest, Clerk.....	1,600	" "
John B. Colvin, Clerk.....	1,400	" "
Josias W. King, Clerk.....	1,400	" "
Moses Young, Clerk.....	1,400	" "
John Barley, Clerk.....	1,400	" "
Andrew T. McCormick, Clerk.....	1,400	" "
Fontaine Maury, Clerk.....	1,000	" "
Thomas L. Thurston, Clerk.....	800	" "
George E. Ironside, Clerk.....	800	" "
Wm. Elliot, Clerk of Patent Office.....	1,000	" "
Joseph Waring, Messenger, State Dept.....	410	" "
Robert Fenwick, Messenger, Patent Office....	250	" "
William Mane, Asst., State Office.....	300	" "

\$21,160

The chief clerk's salary had been increased to \$2,000 per annum by the appropriation act of April 20, 1818,²⁸ and the following year (Act of February 20, 1819) the Secretary's compensation was raised to \$6,000.²⁹ Up to the year 1853 the chief clerk was the second officer in the Department and was not only the head of the executive force, but acted as Secretary when his chief was absent. Daniel Brent held the office for twenty-six years until August 8, 1833, when he was appointed Consul at Paris. His successors passed in and out of the office in rapid succession until Robert S. Chew was appointed May 8, 1855, remaining in office until his death, August 2, 1873.

In 1853, by Act of March 3, provision was made for an Assistant Secretary of State at \$3,000 per annum,³⁰ the act of July 25, 1866, created the office of Second Assistant Secretary at \$3,500 per annum, increasing the Assistant Secretary's salary at the same time; the act of June 30, 1875, added the Third Assistant Secretary at the

²⁸ 3 Stat. 445.

²⁹ 3 Stat. 484.

³⁰ 10 Stat. 212.

same compensation. These officers still remain at the head of the Department.

The act of August 12, 1848, provided that a clerk whose compensation should be \$2,000 per annum, be assigned to the duty of examining claims presented to the Department of State of American citizens against foreign governments, and by act of July 25, 1866, the office of Examiner of Claims with an annual salary of \$3,500 was established.³¹ It was abolished by the act of July 20, 1868,³² and re-established May 27, 1870,³³ and when the Department of Justice was organized June 22, 1870, the office was transferred to its nominal jurisdiction, the nature of the duties, however, remaining undisturbed. By act of March 3, 1891, the title was changed to Solicitor of the Department of State.³⁴ He was the law officer of the Department from the time the office was created, rendering opinions upon questions of law when the Secretary directed him to do so and having supervision of all questions relating to claims.

In the expansion of the Department's business certain clerks were assigned to certain branches of it and from this division of labor came the establishment of the bureaus or divisions; but there were no such bureaus or divisions recognized by title or regular arrangement until Secretary Louis McLane submitted a formal memorandum on the subject of his Department to President Andrew Jackson on August 29, 1833. He had, he said, upon entering upon the duties of his office, caused a report to be made to him upon the condition of the business of the Department with a view to more perfect organization, and had drawn up regulations which he submitted for the President's approval. He invited attention to the "Magnitude of the archives of the Diplomatic Bureau," and the necessity for larger accommodations, observing that each of the other bureaus was at a similar disadvantage. He, accordingly, recommended that the Fifth Auditor's office, which was occupying three rooms contiguous to those appropriated to the Department of

³¹ 14 Stat. 226.

³² 15 Stat. 96.

³³ 16 Stat. 378.

³⁴ 26 Stat. 945.

State, be moved to the new building about to be rented to the Government. The President approved the report and ordered that its recommendations be carried out.

The following arrangement of the "gentlemen employed, the distribution of their duties, and rules for their performance," were directed to be observed:

1. Chief Clerk. His duties were to be "such, in all respects, as pertain to an Under Secretary of State." He was to exercise an immediate superintendence of the bureaus, to see to the distribution of the letters and other communications and report all acts of misconduct or omission to the Secretary.

2. The Diplomatic Bureau. It was to attend to all notes and instructions, prepare letters of credence and treaties, receive, register and file all dispatches. The duties were to be divided among three clerks, one to have charge of the missions to England, France, Russia, The Netherlands; another to index the instructions and the dispatches and have especial charge of the missions to all other countries in Europe. The third was to have especial charge of the missions to countries in North and South America. An index of all the business was to be carefully kept, and a synopsis of the state of each mission; beside a register of daily transactions, occurrences and communications relative to the business of the bureau. A general weekly correspondence was to be kept up with each of the missions abroad, containing general information of a foreign and domestic character.

3. Consular Bureau. It was to have charge "of all business generally appertaining to the Consular concerns of the Department." Indexes, registers, and synopses were to be kept as in the Diplomatic Bureau. Two clerks were to perform all the duties.

4. Home Bureau. One clerk was to perform the duties, which were to file and register all domestic correspondence, authenticate certificates under the Department seal and keep the registers of seamen and arrivals of passengers from foreign ports.

5. Bureau of Archives, Laws and Commissions. It was to keep and arrange the archives, make out and record commissions, have charge of the rolls of laws, their publication and distribution, and

also of the messages of the President and reports of Heads of Departments, and all applications for office. Ordinarily one clerk was to perform the duties, but another was to assist when the publishing and distributing of the laws was in progress, and for the present in arranging and putting in complete order the archives and papers.

6. Bureau of pardons, and remissions and copyrights and of the care of the Library. One clerk was to perform the duties, preparing the pardons for signature, receiving all copyrights directed by law to be deposited in the Department, collecting the statutes of the different states and caring for the Library.

7. Disbursing and Superintending Bureau. One clerk was to perform the duties of making purchases, keeping the accounts, and paying out the appropriations, and keeping the seal of the United States and of the Department.

8. Translating and Miscellaneous Bureau. It was to translate "all letters, papers, and documents of every description whatsoever relating to the business and duties of the Department." It was also to enter upon the mail books all communications received at the Department; to make out and record personal and special passports, and write the letters on that subject, correspond with the dispatch agent, file miscellaneous letters. One clerk was to perform the duties.

Beside this definite arrangement two clerks in the Secretary's office were to copy generally and render such assistance to the other clerks as might be rendered necessary from time to time.

One unassigned clerk was to temporarily assist in Bureau No. 4.

The arrangement of clerks in the Patent Office was to remain unaltered for the present.

Notwithstanding the arrangement set forth the Secretary was to be free to direct any clerk to perform such duties as he saw fit.

The hours of business were to be from ten A. M. to three P. M., during which hours no clerk was to be absent, without special permission.

All business was to be treated as strictly confidential. All communications, except as to matters of accounts, to and from the Secretary, with the gentlemen employed in the Department, were to be

made through the chief clerk, unless otherwise invited by the Secretary.

"A particular and minute Register" was ordered to be kept, under the direction of the chief clerk, of the receipt of letters and communications and of their daily disposition, and of the Department's action.

A similar register was to be kept by each bureau.

All business referred to the respective bureaus was to be finally acted upon and disposed of on the day of reference, unless impracticable for good cause, "so that the business of one day shall not be left to accumulate for another."

Copies of papers on file were in no case to be furnished to individuals having an interest in them; "and no copy of any letter relating to the Diplomatic or Consular Bureau shall be at any time furnished to any one, without express direction of the President of the United States, or of the Secretary of State."

No one was to write any letters relative to Department business without the Secretary's approbation.

Leave of absence for a longer period of time than twenty-four hours must be requested of the Secretary in writing.³⁵

John Forsyth, who succeeded McLane the following year, modified the distribution of duties, his order taking effect October 31, 1834.

The Home Bureau was enlarged. One division was to register the returns of passengers from foreign ports, the abstracts of registered seamen and prepare the annual statements thereof for Congress; also to record the domestic and miscellaneous correspondence; and to have custody of treaties and foreign presents permitted to be shown to visitors. Under another clerk was all the domestic correspondence of the Department not pertaining to any other bureau, the making out and recording of commissions, preparing statements of vacancies occurring and of expiring commissions, the making out and recording of exequaturs, the receiving and filing of applications for office, the preparing of certificates to be authenticated under the seal of the Department and the custody of the seals of the United

³⁵ Papers from the President, 1833 to 1836, Dept. of State, MSS.

States and of the Department. Another clerk had charge of the petitions for pardons and remissions of sentence and passports and correspondence relative thereto, and kept a daily register of all letters received other than Diplomatic; of their disposition, and of the action of the Department thereon. To make the proper entries in this register each bureau, except the Diplomatic, was required to send to the Home Bureau the purport of all answers to letters as soon as prepared, or if no answer was to be given, must state the disposition made of the letter. The register was to be submitted daily to the Secretary. Another clerk was to file and preserve the returns of copyrights and register the copyrighted books, and prepare the letters relating thereto; also to record reports to the President and two Houses of Congress and assist in recording and copying generally. What had been the Bureau of Archives, Laws and Commissions was abolished and the office of the Keeper of the Archives took its place, with one clerk who was to have charge of the Archives of the Department, other than Diplomatic and Consular, and their arrangement and the correspondence relative thereto. He also had in his care the rolls of the laws and their recording, publication, and distribution and the distribution of public documents.

The Translator and Librarian was to make the translations and perform the duties of Librarian. Instead of the Disbursing and Superintending Bureau was substituted the Disbursing Agent who was to have charge of all the disbursements and purchases, under the control of the President and Secretary of State.³⁰

The work of the Department was thus elaborately subdivided. It remains to follow the changes and developments of the divisions.

GAILLARD HUNT.

[The next section will be devoted to a further consideration of the Subdivisions of the Department.]

³⁰ 1 Circulars, 54.

THE SLAVE-TRADE IN THE SPANISH COLONIES OF AMERICA: THE ASSIENTO¹

INTRODUCTION: THE "PACT COLONIAL" AND THE ASSIENTO

President Monroe in his famous message to Congress, December 2, 1823, aimed both at the attempts at colonization which Europe might be led to make upon American soil, and the efforts which Spain might make to place its emancipated colonies again under her yoke. Europe saw with displeasure that the watch-word "America for the Americans," by which phrase they briefly and incompletely condensed the purport of the message, had a double significance, political above all for the United States, but one almost exclusively economic for the countries of Latin-America, which adopted it with enthusiasm.

The policy of Spain with regard to her colonies, although it no longer, since Charles III, sanctioned the system of ruthless exploitation which had been in force during two centuries, was incapable of adapting itself to the modern necessities of the life of nations. The colonies had been ruined by a régime of exaggerated exclusivism and of unbounded deception, the latter continuing when they tried to abandon the former. It would be difficult in our day to imagine what the Spanish colonial system was in its beginning. Claiming by right of conquest the possession of the New World which they had discovered, and which Columbus had given them without knowing it, the Spaniards were the first to invent the absurd system known by the name of "pact colonial" or of reciprocal exclusiveness. The "pact colonial" consisted in its essence of the following: all the products of the colonies must be carried to the mother-country, upon Peninsula vessels, and bought by merchants from the Peninsula, who were invested with a second monopoly which was the counterpart of the first; to provide the colonies with all manufactured products

¹ This article was translated from the French of Professor Scelle by Mrs. Edna K. Hoyt, of the Department of State, Washington, D. C.

which might be necessary to them. The results were fatal; the products of the colonies were bought excessively cheap, as they were in superabundance and had but a single market; on the other hand, the manufactured products of the mother-country reached exorbitant prices, being more insufficient to the demand as the colonies became more extended and more populous.

Lastly, the colonists, deprived of a merchant marine and condemned not to engage in manufactures, vegetated in a state of civilization as stagnant as it was precarious. When they wished to react, it was too late, they did not know how to go about it, and besides, one can not with impunity condemn human societies to ignore progress without lessening the social value of the individuals.

The disastrous effects of this system were felt more in the Spanish colonies than anywhere else, because it was a whole world which Spain proposed to place under this withering régime, and because, by the decay of her industries, the mother-country was less able than any other to satisfy the needs of her colonists and subjects beyond the seas. The results, therefore, of this lamentable policy were still felt at the period of the emancipation of the countries of Latin-America, of which they were one of the hidden but certain causes. One might wonder even how the New World could live under a régime so contrary to the nature of things, if one did not remember that illicit trade, or as they termed it then, colonial "interloping," was raised there to the dignity of an institution. The colonies established in the Antilles by England, France, Holland, Denmark, Brazil itself in the hands of the Portuguese, and by the colony of the Sacrement, served as warehouses for the merchandise of Europe. The Spanish officials, better posted with regard to the needs of the colonists than the Government of Madrid, closed their eyes to the clandestine traffic, which besides was most lucrative to them, for when they did not carry it on themselves, they charged dearly for their toleration. That is the way that America was able to live.

One of the most important factors of this illicit trade was the slave-trade, and the importance which the traffic in slaves took on on this head for maritime nations, rivals of Spain, came exclusively

from that. But how are we to account for the fact that Spain did not monopolize the slave traffic as the others, in what way explain why she left the monopoly of it, generally known under the name of *Assiento*, to such dangerous rivals? This is what we have undertaken to investigate. These studies have led us at the same time to inquire into the manner in which the American slave-trade was organized, and to fill a gap in history upon that point. Certain indications permit us to suppose that this kind of industry was invested at different periods with a considerable importance, not alone from an economic point of view, but from a political and diplomatic point of view as well. The maritime powers had sought to monopolize this branch of trade, especially when it was directed towards the Spanish colonies of America, and England had the exclusive exploitation of it granted to her by Philip V at the Congress of Utrecht. The famous clause of the Anglo-Spanish treaty of 1713, the article of "*L'Assiento*," was not an isolated fact; it was scarcely credible that the sole desire of securing to themselves a few advantages was the reason for the care which the English took to monopolize that branch of commerce. It was interesting to know the antecedents of that *Assiento* and certain authors had investigated them. They knew that a great French company, the Company of Guinea, had obtained the monopoly at the accession of Philip V; that before it the Portuguese, the Genoese, and Germans had had it; but that was about the extent of the information which they had. This curiosity deserved to be better satisfied.² But in the first place what is an *Assiento*, and what is the origin of the *Assiento* of the blacks?

Assiento is a term of Spanish public law which designates every contract made for the purpose of public utility, for the administration of a public service, between the Spanish Government and private individuals. The administration of a tax, an enterprise of colonization, of public works, of recruiting the militia, of providing

² Some rather complicated but very fruitful researches have led us to the principal depositories of archives of France, England, Spain, and Portugal. We have recorded the results in a work entitled: *La traite négrière aux Indes de Castille* (The slave-trade in the Indies of Castile). three volumes, two of which have been published, by Larose et Tenin, Paris, 1905.

manual labor or materials was done by *Assiento*. When it was a question of realizing upon the vast territories with which Columbus had endowed Castilè, new types of *Assiento* made their appearance: they had *Assientos* for colonization and for discoveries by which an "adelantade," an adventurer, undertook to explore, to clear up, to people a specified region. They had more restricted *Assientos* for the transportation of objects necessary to the new colonists, etc.; lastly, they had *Assientos* for providing manual labor.

The latter early made their appearance, for very soon the aborigines and the Spanish colonists were found to be inadequate for the improvement of the new lands. The aborigines were an inactive, lazy race, showing so great sluggishness that they preferred death to work. The cruelties and the exploitations of the still merciless conquerors were such that they may be accused, without too much exaggeration, of having perpetrated the slaughter of an entire race. The methods of "apportionment" and of "distribution" (*repartimientos et encomiendas*) established a system of slavery of incredible inhumanity which decimated the aboriginal populations. As to the European colonists, they were unaccustomed to work, unfitted to endure the climate; besides the colonist is not a tiller of the soil, he is a manufacturer, a merchant, an official, he does not improve the land.

Moreover, the colonizing was badly done; the Antilles, more and better stocked, were abandoned to the advantage of the continent, beginning especially with the period when gold mines were discovered. But for these mines particularly laborers were needed; the gangs of unfortunate natives worked slowly and produced little; one negro was worth four of them, it was said, and the climate was so habitually healthful for the negroes "that it seemed made for them as much as for the orange trees," says Herrera,³ the official chronicler of the Spanish monarchy. The negroes became especially necessary to the plantations when sugar-cane was introduced and people understood that the production of precious metals would not be inexhaustible.

It was not difficult in the beginning to procure them; there was a

³ *Ibid.*, II, 3, 14.

sufficiently large number in Spain itself and in Portugal: slavery had never completely ceased to exist in Europe since the Roman era, and had at least persisted in the far East and far West of the continent, in Turkey and in the Iberian peninsula. The Mediterranean relations there, the proximity of the Barbary Regencies, the wars sustained against them by the Catholic Kings, had multiplied the Moorish slaves; then, the discoveries of the Portuguese, the expeditions of Béthencourt to the Canaries, those of Prince Henry the Navigator along the African coasts, the founding of the slave trading company of Loango in 1460, had supplied Azenegues and Barbary slaves. There were also white slaves, Jews, women coming from Turkey and from Asia Minor. Thus the first slave expeditions were made directly from the mother-country, but they soon became wholly inadequate. As the shadow of the flag of Castille was extended, the need for manual labor increased, and it soon became necessary to think of going to Africa itself to seek the slaves, who had become indispensable. Then the problem of the organization of the slave-trade presented itself.

This problem was complex only by reason of the curious organization of Spanish colonial commerce. Not only were foreigners excluded from it, but, of all the kingdoms over which the Hapsbours reigned, Castille was, at first, the only one admitted to undertake it, because Castille alone had directed and supported the expeditions of the High Admiral of Spain. In order the better to secure the monopoly, this commerce had no other point of departure, no other point of arrival, but Seville, to which afterwards Cadiz and the small ports of the Guadalquivir were added. It was wholly in the hands of the "*Consulado*,"⁴ the organ of the society of merchants, and of the "*Contratacion*,"⁵ the central administrative, financial and jurisdictional organ, in which were concentrated the products allotted to the royal treasury, where licenses for navigation were delivered, where the complicated and rigorous regulations of the "Course of

⁴ Tribunal of commerce appointed to try and decide cases which concern navigation and trade.

⁵ A house or place where agreements and contracts are made for the promotion of trade and commerce.

the Indies," that is of transatlantic navigation, were worked out under the supreme legislative authority of the "Council of the Indies" having its seat at Madrid. Nothing more arbitrary and more burdensome can be imagined than the regulations governing this commerce, especially when it ceased to be abandoned to the initiative of private individuals, to be made only by the official means of periodical galleons and fleets.⁶

To allow entire freedom to the slave commerce would have been to ruin this complicated structure which the least fissure threatened with a total downfall. Such a network of jealous regulations could only last as long as not a thread should be detached from it, and the most severe enforcement should guarantee its being respected. To leave the slave traffic free, was to permit those directing it to carry all kinds of merchandise with the negroes without paying the duties and to ruin the monopoly of the people of Seville. On the other hand, it was almost impossible to submit this traffic to the strict rules of the metropolitan commerce. How, without risking a frightful mortality, could all of these human cargoes be compelled to come into the great Andalusian port, and be reshipped afterwards to America? How could those directing the commerce be prevented from loading directly in Africa? The regulations always strove so far as possible to assimilate the commerce done over African counters to that of Seville; the vessels had to come to the *Contratacion* to be registered, make their returns in the Guadalquivir, and fraud was pursued, but not prevented.

The problem was complicated with other facts besides: the Spanish Government was always unprovided with slave agencies upon the African coast; the nation which, by the vastness of its colonial domain, had the most urgent need of negroes, saw itself, since the Bull of Alexander III, stripped of the means of procuring them itself. She was forced from the beginning to appeal to her rivals, the Portuguese, then to the French, to the English, to the Dutch, who were seeking the means of reaching these enchanting Indies, whose riches tempted them, and whose gateway was jealously closed

⁶ See for the details and the bibliography, the preliminary book of the author's work, above cited, Vol. I.

to them. That was soon the great difficulty. How could foreigners be asked to allow access to their agencies without admitting them to the American colonies? How would they obtain for them labor which was indispensable to develop their domain beyond the seas without granting to them the economic and political compensations that they would not fail to claim? During the course of three centuries the Spanish Government struggled in this dilemma without ever succeeding in freeing itself from it. It is there that the interest of this study truly rests, for when the great nations of Western Europe, in the seventeenth and in the eighteenth centuries, had their economic expansion it was towards the immense domains so poorly exploited by Spain that they immediately turned their eyes. Without doubt the policy of exclusion, which these nations followed themselves, in imitation of Spain, towards their own colonies, prevented them from avowing their real designs; but all occasions were good, all pretexts utilized to interfere with or to establish themselves in America. The slave-trade supplied the easiest method and the most advantageous screen to hide the goods with which they inundated the markets of the New World, and that is why the Dutch, Portuguese, French and English contended for the privilege of furnishing the subjects of His Catholic Majesty with labor. The political competitions to which this fierce cupidity gave place, the importance of the negotiations with regard to the *Assiento* in the diplomatic rivalry of the seventeenth and eighteenth centuries, the effective, if not very apparent, results, obtained by the commercial powers possessing the *Assiento*, deserve, we believe, to be brought to light.⁷

⁷ It must be remarked that the desire of defending her commercial monopoly was not the only one with the Spaniards. A very apparent financial policy was added to it, for the necessity for the Spanish-American colonists to have an abundant supply of labor made the trade in negroes the most important of all, and the Spanish Government had not failed to load it with high taxes which it was always more difficult to collect from the foreigners than from the subjects of the Catholic King. In addition, the Government of Madrid always feared that in confiding this branch of commerce to foreigners, often to heretics or to Jews, it would permit the contagion of false doctrines upon the lands which the Holy See had charged it to conquer to the faith. This point of view, which we are unable to consider here, is not the least curious one. See the author's work, liv. III, chap. VII, *L'Assiento et l'Eglise d'Espagne au XVII^e siècle*.

THE SPANISH AND PORTUGUESE SLAVE-TRADE

The first slaves carried to the Indies were taken as servants; the first colonists either shipped them with them or had them forwarded from the mother-country. A license of the company was necessary in order to transport them, as was necessary for every emigrant and for every voyage of a vessel or cargo. Numbers of white slaves were sent in this way as servants, or even under worse conditions, recalling almost exactly the story of Manon Lescaut.

They had soon to think of more considerable consignments. Everybody was agreed on this point: Columbus, Ovando, the Governor of Cuba, Las Cases, whose role has often been wrongly estimated,⁸ Cardinal Ximènès. Official expeditions took place and the merchants of Andalusia bought slaves from the Portuguese or sailed themselves to the coasts of Africa.

Nevertheless, at the accession of Charles the Fifth, the slave-trade was for a time suspended; they arranged for a new regulation of it. The government made at that time a clean sweep of all the financial projects that had been worked out and gave to the French institution a considerable extension in granting to one of the favorites of Charles, Garrewod, the Governor of Brésa, the right to bestow all the licenses (four thousand) which should be sold during a certain period. This was to take from the very beginning of this commerce the course which could be most criticised — that of monopolizing it. The Governor of Brésa hastened to resell the licenses which had been granted to him, and the holders of his privilege realized exorbitant profits. The result was at once momentous; the price of negroes went up in such considerable proportions that it became very difficult for the colonists to procure them. Yet the Spanish Government persisted in the same course, and, on February 12, 1528, concluded a contract with two Germans, well informed as to the commerce of Seville, who pledged themselves, for the concession of the monopoly, to carry four thousand negroes to the Indies in four years, not to sell them for more than forty ducats, and immediately to pour twenty thousand into the Royal Treasury. This

⁸ See for his justification the author's work, Vol. 1, book 1, chap. 1.

was the first *Assiento*, a real contract to supply slaves, a contract of public utility for the use of the colonies.

The contract of the Germans gave no better results than that of Garrewod; the colonists were poorly supplied, the *Assientists* (contractors) made a bargain with the Portuguese, who took advantage of it to gain admittance into the Indies and there to begin contraband trade, which soon became the chief aim of the contractors. The failure of this combination would without doubt have been still insufficient to enlighten the government, if an *Assientist* had been found willing to buy the monopoly as dear as the government wished to sell it; but no one was found, and they decided to go back to the practice of government control. Up to 1590 the administration delivered the licenses, except for the conclusion of certain partial *Assientos* destined for the working up of some country still uncultivated or for the execution of some public work.

The government in the grant of licenses was above all engrossed with the idea of collecting great sums. The "yearly revenue" of the negroes, in fact very prolific, saw its product centralized in the coffers of the *Contratacion* and became one of the greatest resources of the monarchy. Heavy loans (*juros*) were based upon this revenue. Annuities of this kind, assigned according to the procedure of the ancient régime, filled everybody's purse; the licenses themselves were sold on the market of Dégrés at Seville; all the people of Seville dealt in them as real values of exchange and became thus a population of slave-traders. The government was less successful in the measures it thought fit to take to prevent illicit trade; in spite of a cordial understanding brought about in the second half of the sixteenth century with the kings of Portugal, and thanks to which the agents of the Government of Lisbon in the African agencies had to watch over the observance of the regulation proclaimed by the Council of the Indies and the *Contratacion*, they could never prevent the captains of slave ships from carrying to the Indies considerable quantities of merchandise and selling many more slaves than were shown on their registers. Many of these contractors, in fact, were not Spaniards, but Portuguese, Italians, even Germans, for gradually the Spaniards exempted themselves from carrying on

this commerce; the license became current money which each person could utilize as he saw fit.⁹

When Philip II, in 1580, took in his hands the two scepters of the Peninsula, it seemed as if the difficulties of supplying manual labor could be easily solved. The Government of Madrid had as subjects precisely the same slave-traders who had victoriously competed with its own traders and it acquired the African agencies which it lacked before. There was even in a commercial alliance between those carrying on the trade of Lisbon and the colonists of America an excellent means of government, and the residents of the African settlements cordially welcomed their new sovereign.

But the hopes of collaboration were very soon destroyed. Nothing was farther from the intention of the Spanish Government than the fusion of the commercial interests of the two peoples. Quite the contrary. Under the pretext of respecting the autonomy of Portugal and of preserving her laws, Spain took care that the economic and commercial separation of the two monarchies should be maintained. Adopting the selfish views of the *Consulat* of Andalusia (board of trade), it persisted in excluding the Portuguese from the commerce of America, while, at the same time, by an inequality of which Lisbon did not cease to complain, the agencies of Africa were accessible to the merchants of Seville.

The Portuguese slave-trade was therefore far from attaining, during the Spanish rule, that is from 1580 to 1660, the extent which the reunion of the two crowns could have enabled it to acquire.

At the time when Philip II took possession of Portugal the commerce of the African agencies was generally farmed out to wholesale contractors, veritable *Assientists*, distributors of licenses to private traders, traders themselves, and watched over by the metropolitan administration. The heaviest branch of the traffic was that of slaves. It was sought to utilize these *Assientists*, and they were permitted, not without hesitation, to carry to the Castilian Indies

⁹ See the author's work, book 1st, and among the documents the publication of several of these licenses enabling one to reconstruct the principal types (Documents 1 to 22).

a third of the slaves for which they bartered in the agencies on their own account; but they could do this only by respecting the conditions imposed before on every holder of a license; registration had to be effected at Seville or in the Canaries, they must come back there to bring the returns, and bind themselves not to export gold and silver which must flow solely into Spain. It may be imagined that such unreasonable demands would create fraud and that these regulations were but little observed.

The African contractors proposed to give a new impetus to the slave-trade and to procure more ample resources for the treasury by the conclusion of more extended *Assientos*. The commerce of Seville, which feared, not without reason, to see its rivals profit by it to carry on the commerce of merchandise to the Indies, was able to inspire the government with the same suspicion. A scheme of *Assiento* was discussed and nearly concluded with the *Consulado* which was charged with the entire supply for the Spanish Indies; but the people of Seville would not farm out the slave-trade at a high enough price. In spite of the efforts of the African contractors, they decided to confide the *Assiento* to a Spaniard, Pedro Gomez Reynel, who made enticing promises (1595).

It was an equivocal solution. They had understood that the acquisition of the Portuguese agencies would permit them to do more and better than in the past; but, as they did not wish to trust the management of this commerce to the Portuguese agents, they chose a Castilian, whose administration would have its seat in Spain, who, doubtless, could get his supplies only in Africa, but over whom they would have surveillance to prevent smuggling. This system of half measures was doomed to a fatal check.

The role of the *Assientist* is above all to sell licenses to those willing to carry on the trade for a maximum price; he reserves for himself only a certain number of licenses and the exclusive right of supplying Buenos Aires. He binds himself to transport about thirty-eight thousand slaves to certain ports which shall be designated to him. The registration at Seville, the visit to the Indies are always obligatory. The *Assientist* establishes agents in Africa and in America; the majority of these purchasers of licenses are Portuguese, as are his contractors, and most of his agents.

It is proper to note here the origin of an institution which will be in force later on and will play an important part; it is that of the judicial commissioners, or the "conservator judges," appointed in the Indies and in Spain to settle difficulties arising from the *Assiento* between the *Assientist* and private individuals. They are chosen by the *Assientists* themselves or designated by the Council of the Indies among the royal and commissioned officers; their duties shall never result from mere possession of office.

The *Assiento* of Reynel is the first *Assiento* that one can really choose as a model; being concluded by public competition and accompanied by high security (150,000 ducats) furnished by the *Assientist*, assuring to the latter the monopoly of the sale of licenses, guaranteeing the contractor against the fraud of those who would like to transport slaves to the Indies without license, by means of confiscation and fines, warning him against the case of *suvis major* (naval war or insurrection of slaves), and assuring to the Treasury an annual revenue of one hundred thousand ducats. Subsequent *Assientos* were made upon this model.

The *Assiento* of Reynel did not succeed; he encountered the ill will of the contractors in Africa and of the Portuguese traders. Both of them saw in him a successful rival and they came to an agreement to carry on contraband slave-trade. Reynel had to have recourse to settlement; in the impossible situation in which he found himself when attempting to prosecute these many violations, he compromised with the smugglers. This was the origin of the impost to which all his successors had to have recourse.

The institution continued to perfect itself during the course of the seventeenth century. A special *Junta* was instituted in 1601 to discuss the new contract. This machinery of the Spanish administration, composed of councillors of the Council of the Indies under the presidency of the governor of this council, of councillors of finance, and of fiscals of the two councils, continued from that time although its composition had never been fixed and the king composed the *Junta* anew on the occasion of each *Assiento*. The successor of Reynel was the captain-general of Angola, farmer of

the duties of Africa, Juan Rodriguez Coutino. They went back inevitably to the most natural practice: confronted with the failure of the Spanish *Assiento*, they resigned themselves to an appeal to the Portuguese.

The *Assientist* bound himself to continue the payment of annuities, and the whole financial administration resulting from the slave-trade was thus in his hands. Difficulties were not long in arising however; Coutino entered into a law-suit with his predecessor, who claimed the right to utilize the unemployed licenses for which he had paid the duties. The confusion of administration, resulting from the continuance of the system of licenses, was always a source of complications and of difficulties between successive *Assientists*.¹⁰ The treasury was rather badly off from the preceding managers; the bidders were accustomed to promise heavy securities, but always furnished them tardily because they could only procure them by means of collections made upon the sales of slaves. From that time it became impossible for them to pay the duties, and the treasury, in seizing the securities, paid itself in reality out of its own money. It was thought they could remedy this by making all the profits of the *Assiento* flow into the coffers of Seville and by leaving to the *Assientist* only the disposal of the minimum strictly necessary to his administration. This was changing the contractor into a director, the contract into government control. The first trial was unfortunate: *Assientist* Vaz Coutino, brother of the preceding, exhausted, became bankrupt; the *Assiento* had to be placed under government control at the expense of the contractor who had failed (1609).

After him the *Assiento* was taken by one Coello, a simple substitute for a Portuguese trader imprisoned at Lisbon for bankruptcy. His *Assiento*, scarcely born, went under without its execution being even begun.

The mishaps of the first *Assientists* did not frighten the bidders; but, as the commerce of Seville complained of the competition of the

¹⁰ Coutino did not know how to get rid of smugglers and when he died his affairs were in a rather bad condition. Vaz Coutino, his brother, took upon himself the charge, in a transaction with the Spanish treasury, of finishing the exploitation and of straightening out the situation.

Portuguese, the Government of Madrid questioned whether it would not be better to go back to the ancient practice and to assimilate the slaves to the other merchandise by exacting that every slave should be sent from Seville. Confronted with the material impossibilities of such a measure they went back to the direct administration under the charge of the *Contratacion*. But this commerce was dead in Spain, the number of licenses delivered was insignificant, whilst during all this period of hesitation, from 1609 to 1614, the negroes were introduced into the Indies illicitly and the coffers of *Hacienda* (the treasury) defrauded of the total amount of the duty. They were forced to return to the *Assiento*. Delvas, a rich Portuguese merchant whose tenders had been already accepted in 1609 and afterwards arbitrarily rejected, re-entered into possession of his contract and obtained for himself and his purchasers of licenses the right to penetrate to the very interior of the lands, while before the *Assientists* had to be satisfied with selling off their cargoes in a few ports. This right, which they called "the internation," was later on to furnish to the *Assientists* a new facility of pushing their smuggling of goods to the most remote districts of the rule of the king of Spain, and to go as far as the most distant mines to gather precious metals which were afterwards scattered over Europe without passing through the channel of the Spanish mints. Delvas always had difficulties with the *Contratacion*. His successor Lamego, also Portuguese (1623), was the first *Assientist* who was able to carry on his exploitation well to the end. Angel and Sossa, who took the contract after him, saw detached from their contract a considerable portion of the licenses which were exploited for the profit of the Cardinal of Toledo, brother of the King (1631).¹¹ The history of this *Assiento* was exempt from sudden changes of fortune, and, like the preceding one, it placidly reached the end of its term. The greatest disappointments of the *Assientists* arose from the naval war which the rebellious Dutch carried on at that time against Spain. After the United Provinces, Portugal was also going to emancipate itself from the yoke of Philip and deprive the Spanish government again of the slave markets of the western coast of Africa.

¹¹ This is the curious contract of Salvago and Atayde. See the author's work, book II, chap. IV.

FOREIGN ASSIENTOS: THE NEW INTERNATIONAL ROLE OF THE SLAVE-TRADE: THE PORTUGUESE ASSIENTO.

So far, the *Assiento* has raised only administrative, financial or economic problems. The institution has remained purely domestic; the vassals or the subjects of the king of Spain are the only ones interested in it. The international role of the *Assiento*, which one has not yet seen appear, has its prelude in the revolution of Portugal. The subsequent importance of the institution will spring from a double series of facts. The maritime powers, England, France, and Holland, have become in their turn slave-dealers, and this, because they have, thanks to the carelessness of the Spanish Government, acquired at the same time possessions in America and agencies in Africa where they supply themselves with laborers. As, on the other hand, they have learned from the example of the Portuguese that the slave-trade was the best way to set aside the prohibitions of the Spanish colonial compact, as the division of the two monarchies deprives the Spaniards of their customary purveyors and as the king of Spain forbids even to his subjects all commerce with the rebels, they can hope to replace them. Spain is not going to consent at once to deliver the gateway to the Indies to them, but she will soon see herself forced to have recourse to their services. She will try no doubt to keep the institution upon the ground of the internal right of trading with the foreign companies as she traded with her own subjects, in denying to the governments under whose jurisdiction those carrying on the trade belong all right of intervention, but she will not succeed. On the other hand, as she well knows that in granting access to her colonies she procures a source of regular profit, and especially opportunity for smuggling of very considerable importance, she wishes to make them pay dear for this favor, to obtain as counterpart political advantages, to make the *Assiento* a *quid pro quo* in a diplomatic bargain. These two desiderata are incompatible; but one of the two points of view soon prevails: little by little the *Assiento* will cease to be a contract of public law and become a genuine treaty.

The incapacity and the unskillfulness of the Spanish Government had done much for the elevation of the House of Braganza; like

Holland, Portugal had put forth its strength and its being in commerce, and they did not pardon the Government of Madrid for the obstacles which it brought to the commercial liberty of its new subjects. The exploitation from which they suffered precipitated the awakening of the autonomist feeling. The kingdom had been left in an intermediary state between province and colony, inferior to that of a protectorate, for all sovereignty, even apparent, was denied to it. Portugal bore the expenses of administration, but Spain caused the profits to revert to her. It would of course have been egotism for her to defend the Portuguese colonies in the least; she did nothing. The Dutch, who were then at the apogee of their glory, resolved to go to the Indies directly and to confine themselves no longer to seeking products at Lisbon to distribute them to Europe. Their East India Company was founded in 1602, which took possession of the richest Portuguese agencies and supplanted them in Asia. They created a second powerful company in 1621, that of the West Indies, and it was at that time that Brazil became their chief objective point. San Salvador fell into their hands. This time Spain was concerned but did not know how to expel them; it was the Portuguese colonists themselves who reconquered Brazil from the invaders. The latter, however, kept an important post, Curaçao, taken from the Castilians in 1634. This island, situated a few leagues distant from Venezuela, was to serve as a warehouse and post of observation in the neighborhood of a very populous country deprived of European goods. In 1667, they established themselves in Guiana.

The English, on their side, under the Government of the Protector, took possession of Jamaica, which was for them the equivalent of what Curaçao was for the Dutch: the key of the Spanish Indies and the depot of their commerce. They added to it the Barbados, Antigua, Montserrat, Tortola, Granada, Tabago, Saint-Vincent, etc. In the mean time, the French also established themselves in the Antilles, at Martinique, at Guadeloupe, in half of San Domingo, at Saint-Lucie. All commercial nations wished to have their little gateways to the country of mines: there is not one, not excepting Denmark, which, in 1671, had found the means of establishing itself at Saint Thomas.

Having colonies in America, the maritime powers were forced to think of carrying negroes there; thence the recrudescence manifested in expeditions towards the coasts of Guinea. The European establishments did not change their nature, they remained simple markets where the caravans of the interior converge, not extending beyond the boundary; the different nations would often pursue each other, at times they agreed to dwell together at the same points. The slave-trade of the agencies of Guinea, once almost exclusively Portuguese, passed into the hands of the French at Senegal and at Dahomy, into the hands of the English in Gambia, of the Dutch at Gorée and at Cape Verde, of the Courlanders and the Danes even, on the Gold Coast.

Thus Spain alone has no agencies in the black country, she can procure manual labor only by turning to her revolted subjects or to her commercial rivals. Both hastened moreover to offer her their interested services. Influenced by resentment, Spain refused to recognize the right of Portugal even to enjoy the law of nations and broke off all relations. A contract for extension which had just been passed with the *Assientists* was revoked, and they suspended provisionally all slave traffic between the mother-country and the colonies. This measure could only be temporary; the colonists could not do without labor. When the scarcity began to be felt, they thought of sending Spanish vessels to get the negroes from the Portuguese agencies; but it was inevitable that the Government of Lisbon, by way of retaliation, should refuse them access to its factories. Notwithstanding the complaints of the colonists they resolved to remain in *statu quo*. They remained there more than fifteen years.

The propositions transmitted by the Dutch, then by the English, notably by Henry Bennett, the Ambassador of Charles II, were likewise rejected no less systematically. A curious circumstance, the complaints of the colonists, very earnest at the beginning of the prohibition, had ended by calming down at a time when the need of the blacks should have exasperated them; the reason was that, seeing that they were sacrificed by the mother-country, they had ended by supplying themselves. Smuggling was considered legiti-

mate from its necessity, and it was the Dutch who supplied the West Indies with negroes; the officers, incapable of resisting the current, found it to their own interest to lend their aid to the smuggler.

The *Consulado*, which saw the smuggling of merchandise increase at the same time, was the first to realize the situation, and its complaints decided the Council of the Indies to raise the prohibition. They sought for contractors in Andalusia, licenses were granted, but, as always, government control gave only the most wretched results. Lastly, the government treated through the medium of a Dominican monk with the *Assientists* Crusade, Grillo and Lomelin, both for the *Assiento* of the slaves and for the construction of vessels for which it had great need, the Spanish fleet being then in the most pitiable state.

Grillo and Lomelin were very rich Genoese; their nationality did not inspire the same fears as that of their competitors. The contract was concluded July 5, 1662, but their speculation was destined not to be successful. In the Indies they found themselves the target of the opposition of the colonists and officers who, accustomed to supply themselves freely and at a low price from the Dutch smuggling vessels, rebelled against the *Assiento* which brought in its train high prices and scarcity. At Porto Vélo the agents, several times in danger of their lives, could not obtain protection from the authorities. The reason was that this time it was no longer a question of a leasing of taxes, it was a genuine commercial monopoly which was given to the *Assientists*; they were no longer the dispensers of licenses which had disappeared, they had the monopoly of the transportation and the sale of the negroes.

This *Assiento* reveals moreover conceptions of an international order new to us. Forced to seek their slaves in the agencies of maritime powers, rivals of Spain, the *Assientists* promise not to get their supplies from the Portuguese, always discriminated against, and to have recourse only to the French, English or Dutch and only in case that these nations remain at peace with Spain. They are allowed to embark on their vessels, whose crews must be Castilian, foreign interpreters to negotiate with the merchants of the African agencies; but they must not be engineers or soldiers, who could

serve as spies in the ports of the Indies; likewise the American agents must be subjects of His Catholic Majesty, Spaniards or Italians.

The first difficulties arose precisely from the sales of slaves carried on by Grillo and Lomelin with the Dutch and English. The Spanish Government, which had authorized them in the *Assiento*, was afraid afterwards to let the maritime nations get a footing in the Indies, and, influenced by accusations of treachery made against the agents of the *Assientists*, ordered the latter to break their bargains. The exploitation of the *Assiento* was interrupted; the cargo of the vessels was not delivered. In spite of the fact that smuggling of goods had been largely carried on and pushed as far as Lima, where the *Assientist* established an agency, the need of money led the Spanish Government to agree with Grillo and Lomelin and to prorogue their contract.

In 1668, when Portugal had had its independence recognized, commercial relations were resumed. While proclaiming the principle of colonial exclusion, they dreamed at Lisbon of recovering the old profits of the American slave-trade and they applied to the Spanish Ambassador to know whether his government would accept the services of the Portuguese. In spite of the judgment of the Council of the Indies, His Catholic Majesty was of the opinion not to reject these overtures without discussion. This was a first step, and already diplomats were called to take a hand in the conclusion of the *Assiento*. The *Consulado* of Seville having offered to take charge of the enterprise, Abbé Masserati, envoy extraordinary at the court of his Most Faithful Majesty, received order to enquire whether the Portuguese Government would permit the access of Spanish vessels to its agencies; but they had to abandon the project in the face of the intention manifested by the Portuguese of obtaining authorization to send two or three vessels of merchandise to the Indies. In 1670 a Spaniard named Garcia took the *Assiento* in charge. It was soon learned that this *Assientist* had the backing of a great banking house of Amsterdam, the firm of Coymans, one of whose directors was established at Seville, and that he bought the majority of his slaves from the Dutch of Curaçao, not without

helping them, at the same time, in an important smuggling trade. The bankruptcy of the sureties permitted the Spanish Government to declare forfeiture, and this time the body of merchants of Seville took charge of the enterprise (1676). They had to go directly to the African agencies to get their slaves in order to avoid communication between the Spanish colonists and the Antilles, utilized by foreigners as warehouses for their contraband; but, not well informed in this kind of traffic, the *Consulado* had to apply to the Dutch, the principal holders of human merchandise, and did not succeed in supplying the third part of its cargo. They soon asked for authorization to assign their enterprise to two Genoese traders of Seville, Barroso and Porcio. The Dutch had formed the plan of becoming the titular purveyors of the Spanish colonies. The *Assientist* Garcia had made a bargain with the West India Company of Amsterdam but his failure to keep the contract had hindered the company from executing it. The ambassadors of the States-General, Chièze and Schonenberg, did not hesitate to take into their hands the interests of this powerful company and those of the Coymans firm, who entered into partnership likewise with the substitutes of the *Consulado*. The States-General themselves wrote two letters of credence to His Catholic Majesty in favor of the company.¹² Holland took the position that His Catholic Majesty could not modify *motu proprio* a public contract whose maintenance he had promised, and upon the faith of which a company and foreign commercial houses had treated with the *Assientist*. The Spanish Government had no trouble in refuting this claim and in proving that it had treated only with an individual; that only Spanish courts were competent to take cognizance of difficulties to which this contract might give rise, whether between the *Assientist* and itself, or between the *Assientist* and private individuals; that the *Assiento*, in a word, had in no wise gone out of the sphere of the internal public law. It met a much less solid ground, on the contrary, when it denied to the envoy of the United Provinces the right to intervene in favor of their subjects and persistently refused him any reply. It is one of the essential

¹² See the documents in the author's work, Vol. I, No. 32, and chapters V and VI of book III.

roles of diplomats to uphold persons belonging to the jurisdiction of their government when they believe that they are the victims of a denial of justice in a foreign land, and whatever might come of it, the Spanish Government, unable to avoid permitting the *Assientist* to supply himself abroad, found that it was forced to take cognizance of this fact and to consider the interests of foreigners engaged in the enterprise. The quarrel threatened twice to become envenomed, and the Government of Madrid was seen to confide the administration of the *Assiento*, at the time of the failure of Porcio, to his partner, Coymans himself, "Hollander, foreigner and heretic!" and later seriously discuss a treaty project which would have made the Dutch Company of the West Indies the purveyor of slaves for its American colonies.

A violent campaign against Coymans, at the head of which was the Inquisition, prevented his making a success of his administration; the king of Spain was afraid of letting the infection of heresy contaminate his over-seas dominions, and the Council of the Indies found means to dispossess the Dutch who, upon the point of succeeding, saw themselves despoiled by the Portuguese of the advantageous positions occupied by them.

The Spanish Government, compelled to borrow foreign auxiliaries, thought in fact that it was less dangerous to apply to its neighbors whose commerce was less extended, whose fleets infinitely less formidable than those of the Dutch. A powerful company, the Company of Cacheu, had been formed to develop the commerce of the archipelago of Cape Verde and of Guinea; it was ambitious to furnish slaves to the Spanish colonies. The Council of the Indies conferred with a rich merchant of Caracas, Bernardo Marin; the latter was to make inquiries among the chief colonial companies of Europe whether they would be disposed to furnish slaves to the Spanish Government. He himself would undertake, in the capacity of general agent, that they should arrive at the Indies; the treaty had thus been put back under government control. The applications of Marin had little result except in Portugal: he made a treaty with the Company of Cacheu, and believed that he could, assisted only in this

way, take charge of the *Assiento* himself. The government, abandoning its schemes of direct intervention, confided the *Assiento* to him, in 1694; but, after Marin had left Lisbon to go to America, he died, assassinated, it is said, by the Dutch of Curaçao, jealous at seeing the profits of the Spanish slave-trade escape them. The Company of Cacheu which possessed, as the Dutch Company had formerly, a treaty in good form with the *Assientist*, applied to the King of Spain to obtain from him the authorization to carry it out. This was only a pretext, for it had not made any serious preparations for executing it, but it had tried to have granted to it by Marin, facilities of touching in the ports of America and did not wish to lose the opportunity so long sought of obtaining access to the Spanish Indies. They were not deceived at Madrid, and the Council of the Indies refused at first to recognize any right to the company; however, as the treasury was crippled and as the Portuguese ambassador let it be understood that they would not haggle at the price of the favor granted, the *Despacho* decided that the proposals of the Company of Cacheu should be accepted, and that for a loan of 200,000 pesos, to be reimbursed only at the end of the exploitation and upon the amount of the duty of the slaves, the *Assiento* would be confided to it. The Council of the Indies was not even called upon to give its opinion upon the conditions of the contract; neither the *Contratacion* nor the *Consulado* were consulted, although this was a traditional custom. There was, in the full acceptance of the term, an act of government.

The king of Portugal was far from being disinterested in the result obtained. The treasury of His Most Faithful Majesty was interested for a great sum in the affairs of the Company of Cacheu and the Secretary of State, Pereira, had had much to do with the conclusion of the bargain between Marin and the Company, prevailing upon the latter to treat, almost ordering it to do so. It was likewise Portuguese diplomacy which, very cleverly, by effacing itself, brought about the conclusion of the *Assiento* without frightening the Spanish Government by a warlike attitude, such as the Dutch diplomacy had adopted. It averted the competition of the English who offered a more considerable sum, but whom the Government of Madrid justly dreaded more.

The Company of Cacheu, to be in a position to undertake the *Assiento*, claimed and received from His Most Faithful Majesty a sum of five hundred thousand *cruzades* as a loan; it would have preferred, for more safety, that the contract should be made between the Crowns and become a genuine treaty. The Spaniards obstinately refused to do this. In spite of them the *Assiento* became more and more an international affair, but they wished at least to avoid the greatest inconvenience of this state of things, and would not consent to give to a foreign government a title which would permit it to intervene directly, and as an interested principal, in the business of the *Assiento*. They were willing only to treat with a private individual, only with a private company. The Catholic King contented himself with letting it be known, through the medium of the president of the Council of the Indies, that he would be glad to see the contract concluded, and the king of Portugal, knowing well that the interest which he had in the enterprise would always permit him to intervene in favor of his subjects, urged the Company not to abandon the substance for the shadow.

Thus the Government of Madrid let the institution become more and more modified; it had been able only with great difficulty to reject the intervention of Dutch diplomacy when the Amsterdam Company, without being directly charged with supplying slaves, thought that it was interested in it; it was certain that, in spite of all the precautions of form, it could not now prevent Portuguese diplomacy from intervening in future difficulties which might arise between the Company of Cacheu and the Spanish administration. Now, what hold will the Council of the Indies have against a company which is located in a foreign land, and in which a foreign prince is the party chiefly interested? What authority will the officers of the king of Spain have in the Indies over the agents of a company who feel that they are upheld by a sovereign and independent nation?

Moreover, a kind of diplomatic understanding arose between the two governments. The treaty of 1668, which had recognized the independence of Portugal, stipulated the reciprocal exclusion of the subjects of the two nations from their respective colonies; it

was necessary that the two kings should come to an agreement for the suspension of this principle. They did so by two concordant declarations: the one, by His Catholic Majesty, approved the *Assiento* and granted generously to the Portuguese access to his domains beyond the seas; the other, by His Most Faithful Majesty, authorized his subjects to trade with the Spanish-American colonists.

From these two concordant declarations, which were communicated by the two ambassadors to the two chancelleries, there resulted, if not an international contract properly so called, at least a tacit agreement whose violation could give cause to diplomatic protests.

The exploitation of their *Assiento* appears to have given to the Portuguese, from the start, important advantages, although not so great as those they hoped for. They did not fail besides to undertake smuggling and acted as commission-agents for their compatriots and even for the Spaniards; they carried on the transportation of merchandise for the account of merchants of Seville and of Lisbon. At first they closed their eyes to this at Madrid, but soon difficulties arose; the company complained of the exactions of the officials of America; its agents, abusing perhaps the facilities for smuggling, had engaged in a conflict with several among them. Moreover, disappointments were multiplied; the sack of Cartagena by the fleet of Pointis and freebooters of Ducasse (1697) did considerable injury to the commerce of the company, and the establishment of Scotch corsairs at Darien was the origin of a vast smuggling business in negroes. The governor of Cartagena, to defend himself against the English, put in requisition the Portuguese vessels which he needed and two of them were sunk or captured. The company, which had bargained with the English for the delivery of important cargoes, saw itself prohibited from carrying out the contract, the English having to be considered hereafter as enemies of the monarchy.

The Government of Lisbon resolved to intervene and charged its representative at Madrid to solicit the settlement of these difficulties by means of the Council of State, summoned to give an opinion at first upon affairs of diplomatic order. They knew too well the delays

of the Council of the Indies, and they suspected its partiality; but the Spanish Government had no mind to let this business go out of the internal domain and wished that it should remain with the Council of the Indies. The latter, far from recognizing the demands of the company as established, maintained that it was indebted, on the contrary, to the Treasury for large sums on account of the smuggling of merchandise in which it had engaged. In place of authorizing it to reimburse itself from the duties on the slaves, as the contract provided, for the two hundred thousand pesos advanced, it claimed the right to keep this sum to guarantee the credits which the king of Spain had against it, and peremptorily refused to discuss a petition to obtain a delay of two years in order to finish its exploitation. The opposition of the two points of view was easy to foresee: "I speak in the name of the king, my master," wrote Mendoza, the Portuguese ambassador, "because his subjects have been forced to appeal to him seeing that they are refused justice. I am not the agent of the company, although it is a question of its interests, but the representative of the king of Portugal, and the affair is an affair between Crown and Crown."

The ambassador invoked the understanding between the two governments and maintained that in it there was an international contract. The Council of State declined, on the contrary, to see anything in it save a precaution destined to guard against difficulties which might thwart the execution of the contract by reason of the prohibition of colonial intercourse. These opposed claims were taking the course of a genuine conflict when Charles II died; the Council of State resolved to reserve to the new government, that of Philip V, the solution of this knotty question, not without having drawn the moral from the incident: "The council can not pass over in silence that these *Assientos*, in which the authority of interested sovereign princes intervenes, bring in their train countless and serious disadvantages, and should be avoided even if one has to lose a part of the advantages for which they stipulate." Such was indeed the meaning of the reflections which evolve from the history of the first international *Assiento*.

Past experience, however, was not to be profited by.

When Louis XIV took charge of the direction of the foreign affairs of Spain, he saw immediately that in face of the threatening coalition it would be extremely dangerous to have Portugal for an enemy. Attached to the flanks of the monarchy, master of opening its ports to the allies and to give them access to the Peninsula, its cooperation must be acquired at any cost. King Peter, fretted between two contrary parties, would have preferred to keep his neutrality, at least provisionally, and prudently await events; he held out in any case that he would conclude nothing with Louis XIV unless Spain entered in the treaty, guaranteed his security and settled according to his will the litigations still pending. Rouillé, the French ambassador at Lisbon, received the necessary powers to treat in the name of the king of Spain. He was not long in perceiving that the government of the Most Faithful King meant to distate its conditions: the colony of the Sacrement, so valuable for the introduction of merchandise from Brazil to Peru, must remain the property of Portugal; the Company of Cacheu must be indemnified for its losses. These claims were accepted, and the plans, such as they had been dictated by the Portuguese ministers, came back approved from Versailles and from Madrid. Rendered more exacting by success, the Portuguese came near reopening the whole question by raising a new claim, namely, that the question of the *Assiento* should be definitely regulated by the treaty of alliance itself, that is, that they should promise a fixed indemnity and not only a subsequent settlement. This was demanding much, for the reciprocal claims were complicated and difficult of settlement. Rouillé knew nothing of the details of the business and did not hesitate to declare that the procedure was dishonest and in bad faith. He had to negotiate, however, and succeeded in making the Portuguese deduct a large sum from the total amount which they claimed. Notwithstanding "the disgust" which he pretended to feel at this sort of bargaining, he agreed to an indemnity of three hundred thousand *cruzades* and to the reimbursement of the payment advanced. The alliance was at this price. The question, so important for Louis XIV and Philip V, of the attitude of Portugal during the war which was about to break out, was therefore found bound up in the solution which they would give to the *Assiento*.

It was somewhat difficult at Madrid to get the bargain accepted. Many councillors of the king still looked upon the Portuguese as revolted subjects and were indignant that they should buy their co-operation. Louis XIV had to interfere directly with his grandson and make known his wish to conclude the alliance. This was the first time the king of France imposed his authority in Spanish affairs. The treaty of alliance was concluded June 18, 1701, and the special adjustment in the affair of the slaves signed the next day, the 19th. It was specified that the fourteen articles which composed it should have the same value as if it made an integral part of the treaty itself and they were inserted in it word for word. The Spaniards, therefore, claimed that it was as valid as the treaty itself and fell with it, when it lapsed at the time of the defection of Portugal, and it is with justice, we think, that they refused to execute its burdensome clauses. This transaction is a remarkable document in the history of *Assientos*; it constitutes the first diplomatic instrument, the first genuine treaty to which the institution gave rise.

THE FRENCH ASSIENTO OF THE COMPANY OF GUINEA.

The *Assiento* had seemed, in the hands of the Portuguese, to be as in trust. Maritime nations, at the time of the contract made by Marin with the Company of Cacheu, had discounted the profits from smuggling which they would realize by means of bargains made with the *Assientist* for furnishing black workmen. Moreover, the Portuguese Government had not claimed the right to exclude all collaboration; it knew that it was not in a position to furnish all the slaves and all the commodities which the consumption of the New World demanded, and it saw in the adoption of a tolerant attitude the means of obtaining an unhoped for advantage: the recognition upon the sea of the neutrality of her flag by the maritime powers whose merchandise it covered at the same time as her own.

The Government of Versailles¹³ was the first to suggest this idea to her; for, at the close of the seventeenth century, no country of

¹³ See letter of Pontchartrain to the French Ambassador at Lisbon, M. d'Estrées, November 15, 1692, French Archives of the Marine, B² 3e 86.

Europe carried on greater commerce with Portugal than France. Lisbon already served France as a warehouse for the Spanish markets, which, without that, would have been closed to France, by her long wars with the Hapsbourg. It was through Lisbon that the French reached Cadiz, and quite naturally they thought of making use of the Portuguese to reach the West Indies by disputing with the Dutch and English the privilege of supplying the Company of Cacheu. Pontchartrain even wished more; he tried to make some traders of San Malo enter the company, persons accustomed to the traffic of smuggling in the Spanish possessions of the Atlantic and the Southern Sea.

Louis Martin, one of the richest members of the French colony at Lisbon, had taken a large share in the company. The French ambassador was directed to procure some order for the French Senegal Company. They even planned to permit the Portuguese company, contrary to the recognized colonial policy of the period, to touch at the French Antilles and to take on supplies there; they offered to lease Turtle Island to it.

The English, however, had acted more directly with the minister of the Most Faithful King, and they had received the heaviest orders. Ambassador Rouillé even pretended that they thought of taking the place of the Portuguese; thus, when the Government of Louis XIV saw itself, after the accession of Philip V to the throne of Spain, in a position to procure to French commerce the advantages that it had for a long time been seeking, it decided forthwith to enter into competition with the maritime powers. For that it was necessary to deprive them of the most efficacious means which they had of carrying on smuggling; to end the collaboration which was established between them and the Company of Cacheu, and, if it were possible, to substitute for the monopoly of the latter that of a company of French merchants.

The scheme did not immediately become known; French diplomacy prudently wished to avoid giving umbrage to the Portuguese by appearing to wish to despoil them and to provoke immediate rupture with the still undecided maritime powers, in giving them a direct blow. The most trusted agents of the Government of Versailles,

d'Harcourt at Madrid, Rouillé at Lisbon, Admiral Ducasse, himself charged with a naval and military mission in Spain and the future negotiator of the *Assiento*, were not informed. Yet the decision was taken, and when Rouillé had announced that the transaction of June 19th gave full satisfaction to the Company of Cacheu, when they knew without the shadow of a doubt the intentions of the maritime powers, there was no longer any reason for concealment, and on June 29th Pontchartrain wrote:

I have given an account to the king of the affair of the *Science*(sic). His Majesty has permitted me to follow it and to form a company capable of supporting it and of drawing all the advantages from it for the kingdom that can be hoped for.

It was the second Company of Guinea, the "Company of Guinea and of the *Assiento*."

Ducasse, former director of the Company of the Senegal, charged with organizing the slave-trade in the French Antilles, governor of San Domingo, was sent for the second time to Madrid in August, 1701, with a mission to conclude the *Assiento*. In the mind of Louis XIV the negotiation could offer no difficulty. Considering the confusion of the two governments, they saw in it rather an administrative understanding than a diplomatic bargaining. The Council of the Indies was of another opinion; it had thought again of asking the merchants of Andalusia if they would consent to undertake the slave-trade, and moreover it considered the French as the most formidable competitors of the "carriers for the Indies."

Two commissioners had to be chosen by the *Despacho* (Commission), with whom Ducasse mismanaged the business; the observations of the Council of the Indies, asked for when all was over and especially as a matter of form, had to be sent to the king in two days. No attention was paid to them, and the treaty received the royal sanction at Darouca, September 14, 1701, in the very course of the journey that Philip was making to go to his Italian States.

The treaty, we say. What is, then, exactly the nature of the French *Assiento*? As far as it relates to the conditions made to the *Assientists*, it does not differ materially from the Portuguese *Assiento*; it is a commercial monopoly which is granted to them,

rather than the exploitation of a lease. For ten years the French Company shall have the sole right to carry forty-two thousand negroes to the Indies, and three years more to execute its contract. The powers granted to the preceding *Assientists* are enlarged, but the originality of the contract consists in the following: the kings of France and of Spain are officially interested in the operations of the company, they become slave-merchants, they associate themselves with the *Assientist*, each for a quarter, although the first shall furnish his quota only in the *freighting* of the vessels, and the second may have the whole of the contingent that he must put in the enterprise advanced by the French merchants.

Does not that in any way modify the legal nature of our contract? In 1696 the Spanish Government had taken a step in advance in treating officially with a foreign company, in recognizing in those under the jurisdiction of another power an interest in the commerce of America; yet it had not treated with the Portuguese Government. In the French *Assiento* the two kings agree: Louis XIV to authorize the company to be organized in France with the precise purpose of furnishing slaves to the Spanish colonists, and Philip to grant to it access to his domains.¹⁴ Two authorizations, that of Darouca and in France a decree of the Council of October 28, 1701, sanctioned its situation. Thus far the negotiations resembled those of the preceding contract, but in addition they considered it as bound to procure a reciprocal advantage to the two nations; the treasuries of the two countries (for at the time the interest of the treasury and that of the king is one and the same) are equally interested in the enterprise; there is mutual engagement of the two sovereigns, and the identification which was made at that time between the private personality of the prince and the public person of the head of the state is known. There is then this time, if not a treaty in form, at least an international engagement; and there is in reality only a shade of difference. Nevertheless, the document was not negotiated like a genuine treaty; the negotiators were not diplomats, the Spanish Commissioners do not seem to have received any other instructions save a verbal commission, Ducasse

¹⁴ Article I. — The text will be found in the collections of Dumont and Cantillo.

had no powers from the French Government, he intervened only in the name of private individuals, had nothing but the power of attorney of the directors of the Company of Guinea. They were the only ones who gave a "ratification," in the proper sense of the word.¹⁵ And yet the two kings had contracted reciprocal obligations: Louis XIV would not have been able to oppose the execution of the treaty and dissolve the company without exposing himself to diplomatic claims from Spain; Philip V could not have taken the monopoly from the company, or changed the conditions of the contract, without exposing the Spanish nation to diplomatic claims from France, not alone in favor of the company, but in the name of the interested treasury and of the French nation.

There is here, indeed, something hybrid, abnormal, for this international engagement is subsidiary to an engagement, which was not so at all: the contract between a company and the Spanish Government — and it depends upon this contract. If it were not formed, if it lapsed, the international engagement would follow its fate. It would be difficult to imagine a like situation in our time; two sovereigns would only bind themselves in like circumstance as far as private individuals. The situation is explained only by the ancient conception of patrimonial sovereignty and it permits one to state again how much internal public law and public international law influence each other.

The French *Assiento* would offer but little interest if it had not had for the government another end than that of procuring heavy profits to the merchants and bankers who composed the Company of Guinea, but it is connected very closely with the general policy of the French Government, with the plans that it was elaborating for the restoration of the Spanish monarchy, with the designs which it was forming against the English and Dutch.

The Government of Louis XIV, like all the governments of Europe, saw in the Spanish colonies the centre and the origin of all riches, the sources of the Spanish economic life. The first thing

¹⁵ Nevertheless they made some objections because they were astonished that the Spaniards should have sent them the form of it.

was to restore the colonial commerce of the mother-country, to restore to it its ancient greatness and activity. The *Assiento* was indispensable, for with a lack of workmen, no hope of production could be discounted in advance. Besides it was necessary to re-establish an efficacious and simplified control which would permit so much wasted wealth to flow into the Peninsula.

But they would never succeed without excluding from the commerce of America the English and Dutch smuggling vessels, which diverted the produce of the Indies and permitted the enemies to utilize against the two monarchs the surplus strength and riches which they drew from it. And since Spain was too weak to conduct this vast enterprise successfully, as she had need of an ally energetic enough to guide her, strong enough to defend her, the role of France was plainly indicated: to substitute an accepted and beneficent collaboration for theirs.

But it was not meant that France would bear all the burdens of the alliance and drag a dead weight after her; neither material aid nor men would be spared to Spain; without wishing to place her under guardianship, the Government of Louis XIV wished to draw some profit from the cooperation, and sought it in the Indies. The old Castilians did not understand it this way and prated of tyranny; there was some opposition to overcome, especially on the part of the merchants and of the Council of the Indies. No doubt it was badly and awkwardly handled, but the task was difficult; it was at first loyally undertaken, then the conception of the original plan was altered under the pressure of circumstances. Driven by urgent need for money, the Government of Louis XIV tolerated and even encouraged the contraband trade of its subjects, although it had at first wished to proscribe it. Its influence upon the officials lasted as long as the success of French arms; plans of commerce, wrought out and discussed in spite of the stubborn resistance of administrations, the slaves of routine and guilty of double dealing, had to be abandoned.

The struggle upon the sea against the allied fleets was not always successful, and they had perforce to let them resume their commercial relations with the colonists of the New World. Moreover, the

Spaniards accepted only with reluctance the presence of the French fleets in the waters of America; they were more afraid of smuggling than of the attacks of armed force, and besides Louis XIV, on certain occasions, let his ambition for territorial extension be seen, notably in the Mississippi region, which could only excite the animosity of the Madrid administration. At the time of the peace of Utrecht, it may be said that not one of the ends aimed at by Louis XIV at the time of the accession of Philip had been reached: Spain was poorer than ever, the management of the Indies as lawless as ever and the major part of its trade in the hands of the English and Dutch.

The vicissitudes of the *Assiento* present a very exact summary of these successive disappointments.

Louis XIV saw in the company at first an agent of French influence in the Indies and in Spain. In the Indies it had judge-commissioners of its choice, as the preceding *Assientists* had had; it needed more, it needed the devotion of the greater part of the officials. Its agents had to win them, even watch them, to be certain of their fidelity. In exchange for their good will they would obtain the protection of Versailles where the Spanish administration was handled as much as at Madrid. Certain of these officials were in fact very useful to the company, for instance, the Count de la Monteloa, Viceroy of Peru, the Alcalde of Lima, Don Joseph de Santiago Conchas. But others, taking advantage of the almost complete independence of their position, showed themselves unreservedly hostile, as Zuniga at Cartagena, and, at times even not very loyal to their sovereign, as Villeroche, who, although he owed to the support of the French ministers the presidency of Panama, openly favored there the political and commercial dealings of foreigners. As to the judge-commissioners, the Council of the Indies often prevented the company from appointing them freely, and several among them took much more care to fleece it than to give it aid and protection.

Still certain agents knew how to gain a real influence. Le Cordier of Panama, contributed greatly to the development of French trade in the isthmus and in the Pacific; Jonchée, of Havana, played

in Cuba the role of a consul of small means. He was not entrusted with the interests of the company, but it was his duty besides to prosecute and denounce Anglo-Dutch smuggling, give information to privateers, watch over the tranquillity of the French colony, send back home sailors "degraded," etc. All agents lent themselves to free transportation, loans of money, discreet gifts which might gain for them the good graces of the officials.

The same methods were used at Madrid. The Commissioner-General Don Manuel Garcia de Bustamente was always most devoted to France. A special *Junta*, whose members received a supplementary salary from the company, was entrusted with the settlement of difficulties which might arise, and they obtained by this means notable extensions of the original contract. But in 1706-1707 military disasters almost completely put an end to French influence. She saw the Council of the Indies regain its prerogatives and the affairs of the *Assiento* were directly restricted by it.

In that which concerns the struggle against foreigners, the lack of conscience of the officers of the Indies prevented the company from conquering the smuggling trade of the Dutch. In 1704 it had placed ten vessels on the sea; but this effort, the greatest that it attempted, did not have at all the result hoped for. The general agent, Deslandes, whom they sent to San Domingo, stated, in the course of a general inspection of the agencies, that the Portuguese had maintained themselves at Caracas with the tolerance of the local authorities, and were overrunning Venezuela with slaves and merchandise taken from Caracao, in accord with the Dutch. The latter were in reality masters of commerce at La Guayra, at Saint Martha, at Rio de la Hache. Curiously, they only encountered there the jealousy of the English, who pretended to prohibit their allies from disputing with them the profits of smuggling, and gave chase to their bilanders (vessels of about eighty tons). The English were the ones who were monopolizing the clandestine traffic at Cartagena, at Porto-Vélo, and they passed by Panama into Peru, Chile, and even into the South Sea. The smuggling of Chinese merchandise and of slaves, which was also carried on by the Philippine archipelago, contributed also to make the exportation of its human cargoes most difficult for

the company. It had recourse to the *Indulto*, in the course upon the vessels which His Most Christian Majesty loaned to it; but with little success, owing to the sluggishness and the complicity of the officials and the inhabitants of the Indies, too interested in the continuance of the commercial relations with maritime nations. The company was of little assistance to the Government of Versailles in its efforts to regulate Spanish colonial commerce. It did not even succeed in supplying an abundance of laborers to the inhabitants of America. Obligated to procure them also for the French Antilles, the task was found to be beyond its strength. It had sought to make bargains with the Portuguese; but the latter, even before their defection, kept their slaves for Brazil. They could not apply to the English and Dutch; they only decided to do it reluctantly about 1710, and without obtaining from them very heavy cargoes. French African markets were not sufficient for the consumption, they were not certain; they very soon thought of throwing upon the under-farmers the heaviest part of the burden, but these under-farmers were only thinking of getting rich by means of the smuggling trade. They caused the company all manner of difficulties with the Spanish Government, and it was continually having suits with them.

It must be confessed, moreover, that the company itself was not guiltless of misusing the situation which it found; the access of the Indies was fully open to it, it could enter in all of the Atlantic ports and even at Buenos Aires; it could freight vessels in the Pacific to carry its slaves from Panama to Peru; it must only abstain from all commerce of merchandise. The prohibition borne by the *Assiento* was reiterated by a decree of the Council of June 9, 1703, by means of which Louis XIV hoped to allay the anxieties of the Council of the Indies and of the *Consulado* of Seville; but the uselessness of these precautions was soon perceived. They had certain evidences of this at the time of the return to Europe of one of the first vessels sent out by the company, the *Hirondelle*. This vessel, pursued by the enemies, was wrecked near Huelva and they saw that it carried merchandise whose origin was questionable and some of which was charged to the account of Spanish individuals. One of the directors, Legendre, was found to be compromised in the

business. They succeeded in suppressing all scandal. The agents knew equally how to dissimulate with skill the private commerce which the majority of them carried on in the Indies; but in France they prosecuted with more rigor the captains of slave-ships who were devoting themselves to smuggling. The profits which they made were to the detriment of the company: negroes were huddled together in the bottom of the hold, with no care for the frightful mortality which was caused among them, in order to lodge upon their vessels the merchandise of smuggling; traffic in provisions and clothing destined for the cargo and the crew was carried on, at times even leaving their vessels in distress, by selling the equipments and the artillery. Pontchartrain wished to be severe, to make examples of them, and failed before the ill will of the courts of the admiralty, in which the captains knew how to win powerful support, before the lack of initiative of the company, whose directors were relatives or indebted to the officers of the Royal Marine employed upon the vessels of the *Assiento*.

Pontchartrain ended by becoming weary; it was no longer possible to remedy the evil, and, the finances being exhausted by ten years of warfare, they sought for money on all sides. The comptroller of the exchequer, Desmarets, confessed that he could meet the budgetary exigencies only by means of more or less voluntary contributions imposed on the privateers of San Malo who traded in the Pacific.

As on its side the company of the *Assientist* had furnished heavy sums to the king of Spain, they resolved to close their eyes and to let the directors reimburse themselves as they could for the losses that they had sustained in the slave-trade, the only one which they could legitimately undertake. They thought of asking authorization in Spain to embark upon each ship "a trifling share of merchandise;" but confronted by the impossibility of obtaining such an authorization, the minister thought "that there would perhaps be less inconvenience in permitting the directors to do so without appearing to be aware of it."¹⁰

¹⁰ Pontchartrain to d'Aubenton, December 21, 1707. Archives of the colonies, B. 28.

The directors had besides the opportunity to make up in part for the losses of their regular commerce in a series of operations "on the side" which, without precisely constituting a smuggling commerce, and one tolerated by the Spanish Government, had permitted them, however, to extend considerably the field of their operations. They had already been able by the regular "returns," that is, by the sale in Europe of the products which they accepted in payment for the slaves, to obtain heavy profits; they realized it on cacao, leather of Buenos Aires and tobacco, of which the company at one time thought to furnish the Spanish farmers. But it took especial care to have in America warehouses destined for the storing of provisions, clothes, and pharmaceutic products destined for the maintenance of slaves, machinery and rigging destined for its vessels; these storehouses, always equipped, served especially for the consumption of the colonists. Lastly, it obtained the contract for supplying arms at Buenos Aires, and received in payment a permission to sell there merchandise to the extent of one hundred thousand piasters, from which it obtained three times that amount. Unfortunately, the vessels which were transporting the returns were destroyed by fire.

The Government of Versailles willingly used its influence to obtain for it these indemnities, for it estimated at their value the pecuniary sacrifices that the company had made for the Spanish monarchy. In this point of view it had not failed in the task which was assigned to it in the general policy.

As at the time of the conclusion of the Portuguese *Assiento*, and even before, the Spanish Government was influenced by financial considerations when it concluded the *Assiento* with the Company of Guinea, it was going to have to defend its vast domains with the treasury empty and the revenues coming in poorly. They demanded at first from the *Assientists* advance payment of two hundred thousand crowns, the greatest amount of which was immediately sent to Italy to the Prince de Vaudemont, who ruled there for Philip V. As to the duties on slaves, they amounted to four hundred thousand crowns yearly. The king of Spain must in addition have a quarter of the eventual profits. The urgent need of money multiplied the drafts

that the king of Spain drew on the company which served him as a banker. The Government of Versailles engaged the directors always to accept, at the same time taking care that this money, which came from France, should be usefully employed; at the most it intervened to moderate the sending of the drafts when it appeared to it that the credit of the king of Spain upon the company was overdrawn. The personal expenses of the king, the salary of his ambassadors, and the pensions distributed to his familiars, the Princess des Ursins, the Duke de Louville, a certain young lady Marchand, singing teacher, were assigned to the company. It was the company likewise which payed in 1703 the wages of the musketeers, who made an uproar at Madrid because they found no more credit in the wine shops. In 1709 the pay of the troops of Catalonia was equally furnished by the company, but all that did not go without appeals for funds to which the interested parties did not always respond with a very good grace, and, on three or four repetitions, without burdensome loans. The financial disorder of the company was great, besides, and its situation very precarious when it ceased its operations in 1710. It claimed of the king of Spain more than four millions; but its importunities which were based moreover only upon documents for the most part very disputable, never received satisfaction. They were rather laxly supported in the course of the eighteenth century by French diplomacy which pursued the realization of the family compact and did not wish to discontent the Spaniards. These discussions continued into 1780, when all the interested parties were dead; they died out of themselves without having received a solution.

There was, however, one point upon which its claims were entirely founded. The company had been dispossessed of the two additional years that its contract reserved to it to finish its exploitation. They had, in agreement with the French Government, decided that the English South Sea Company, which was to succeed it, should immediately enter in possession of its contract. The French company had then on this head the right to an indemnity. The poverty of the Spanish treasury did not permit of satisfying it and political necessities forced them to give prompt and entire satisfaction to the subjects of His Britannic Majesty.

UTRECHT AND THE ENGLISH ASSIENTO.

The diplomatic role of the *Assiento* reached its zenith at the time of the Congress of Utrecht; for this contract was the basis of the negotiations between France and Spain, on the one hand, and Portugal and England on the other.

Already, in the course of the War of Succession, England had shown that she did not lose sight of the Spanish Indies. In 1707, when she believed success assured and Charles III king of Spain, she wished to reap the advantage of the cooperation which she had given him.

It is interesting to state that her policy was exactly the same as that of Louis XIV. Her first care was to assure herself of access to the Indies by means of a commercial treaty in virtue of which the fleets which assured commercial relations between the colonies of America and the mother-country should be Anglo-Spanish fleets. Moreover, Stanhope, ambassador and general at the time, made a treaty of *Assiento* with the ministers of the archduke, not analogous, but almost identical with the treaty negotiated by Ducasse.¹⁷ Lastly, the agents of the English Government were able to win over the majority of the Council of the Indies and the majority of the Spanish officials of America to their policy.

Secretly as the negotiations were carried on, they leaked out, however, and the Dutch were not the ones least disturbed by the machinations of their allies; they feared to see them gain a foothold in America and exclude from it all other trading nations. The Governments of France and Spain also thought for a time that they could take advantage of this jealousy and they tried to detach the United-Provinces from the great alliance by making known to them the selfish conduct of the English.

It was by proposing important economic advantages to them that Louis XIV and Torcy hoped to win the States-General at the Conferences of Gertruzdenberg; it is by means of commercial sacrifices in the Indies that Count de Bergeyck, the agent of Philip V, tried,

¹⁷ The author has published this project of *Assiento*, found in the Foreign Entry books of the Record Office, in No. 7 of the Documents, Vol. II of his work.

at the time of the mission with which he was charged in 1710, to sate their appetites. But the pride of Holland was at its height at having conquered the Bourbons; it placed unacceptable conditions, refusing especially to permit French commerce to be interested in a company of international commerce, whose creation was being planned for the development of the Spanish Indies, a company which should, at the same time, be charged with supplying the colonists with slave labor. This uncompromising attitude was stupid, for it permitted the English to secure all the advantages of which they could have obtained their share at that time.

The unhopèd for success of French arms, which in Spain and in Flanders marked the end of the War of Succession, brought about a sudden change in the English policy. When the Tories overthrew the Government of Marlborough, they thought that the nation had need of peace and listened to the voice of the merchants of the city who wished to re-establish their commercial prosperity. Overtures were made at Versailles by the emissaries of Saint John and of Lord Oxford, who let it be understood that they would consent to negotiate in exchange for colonial and economic advantages in Europe and in America. Louis XIV let it be known that he was personally disposed to great sacrifices, and answered equally for the good will of the king of Spain, provided that they should leave the Dutch, whose insolence had incensed him, out of the negotiations. He sent a skillful negotiator to London, Mesnager, a lawyer of Rouen, provided with extended powers.

The English had demanded "real securities" for exercising their commerce in the Indies, in Spain, and in the Mediterranean; they soon learned what this rather vague term signified: by "real securities" was meant the possession of fortified places where the British fleets would find a support. Gibraltar and Mahon, already in the power of the English, remained to them. They claimed in America four ports, two on the Atlantic, two on the Pacific. The entrance duty of these four places would have caused, in a short time, the ruin of French and Spanish commerce. Louis XIV would nevertheless have consented to buy peace at this price, if Madrid would have accepted it, but the Councils could not be brought to the arrange-

ment. Besides there had just been formed in England a powerful commercial company, the celebrated South Sea Company, with the avowed aim of trading and even of establishing itself on the coasts of the Pacific Ocean. Schemes of conquest were attributed to the Government of Queen Anne, and negotiations would have rested there had the English maintained their first pretensions. Mesnager submitted to them in vain a scheme for a commercial company, of which he was the author, and which would have given them the greatest share in the exploitation of the West Indies. He went so far as to propose to them, without success, to internationalize the port of Cadiz and to confide to them the convoy of the galleons which should bring back to Spain the treasures of America. But the Tory ministers had demanded from Louis XIV that he should cede to them the privilege of the *Assiento* of slaves which the Company of Guinea still possessed, knowing well that by this means they would be able to monopolize all the commercial profits which the New World procured, and it was upon this ground that the agreement was made. In consideration of the grant of the privilege of the slave-trade, no longer for ten years, but during thirty years, England consented to desist in her pretension relative to places of safety in the Indies; she only claimed that they should grant to future contractors a piece of ground upon the Rio de la Plata to "revive" there their human cargo. This point did not go without difficulty. The Rio de la Plata was the great path of communication by means of which the Portuguese carried on their contraband trade with Peru and the Spanish colonies washed by the Pacific ocean; they were afraid lest the English, who already were dragging Portugal in their economic wake, should profit by it to penetrate into the very heart of the Spanish possessions and as far as the Pacific Ocean. Louis XIV had to make known at Madrid that all resistance was vain and that he meant that the conditions which he had consented to in the name of his grandson should be ratified. They were, and the preliminaries of peace were settled upon this basis. It is seen, that it is the *Assiento* which played the principal role; it is thanks to the money support which it had furnished in the negotiations that they succeeded in laying the foundations of a solid and lasting peace.

The Dutch tried in vain to thwart the negotiation, giving free course to their jealousy in bitter criticisms, but the English Government held them carefully apart as long as the great lines of the future treaties were not definitely concluded.

Whilst the plenipotentiaries of all the powers engaged in the war were discussing at Utrecht the great political and territorial problems which were arising in Europe, England and Spain continued separately their economic negotiations relative to America. Lexington, the ambassador of Queen Anne at Madrid, and Montéléon, the envoy of Philip V at London, concluded concurrently treaties of commerce and alliance which the Congress of Utrecht had only to record. England made important concessions to Spain; she abandoned especially her claim to a preferred duty of fifteen per cent. on the entrance of her products into Spain, preference which had been promised to her by Mesnager, and this in exchange for a new favor for the future *Assientists*: the permission granted them to send every year a vessel of six hundred tons of merchandise to the Spanish Indies. This was the famous "vessel of license," of which the English were afterwards to make a use as profitable as it was improper. A true floating storehouse, of a much more considerable tonnage than the contract specified, the vessel of license, continually restocked by launches coming from Jamaica or the Barbados, would never grow empty. It served as a warehouse for London merchants, who flooded the great fairs of Porto Vélo and Cartagena with their products.

In 1716 a new convention between the two governments increased the number of authorized tons from six hundred to one thousand, and permitted the *Assientists* to dispatch the vessel before the period when the fairs began. As they were, in addition, exempt from all duties, the competition which they made to the galleons and commerce of Seville was in all respects disastrous. It is proper to state that this is not the first time that a similar favor was granted to *Assientists*: Marin, the Portuguese Company and the French Company of Guinea had already obtained, but once only, permission to send to the Indies a vessel loaded with fruits from the Canaries. This was an exceptional indulgence, while the vessel of license was annual. Moreover it did not prevent the English *Assientists* from obtaining.

in addition, both the ship from the Canaries and the permit to dispatch, for once only, two ships of five hundred tons, the *Elizabeth* and the *Bedford*, which were to serve for the transport of their agents, and which sold a considerable quantity of merchandise in America. Opportunities for fraud were, on the other hand, manifold, the English having had granted to them the freest access to Spanish ports, the right of internment, and, in general, all of the facilities of trade which the French *Assientists* had enjoyed: general storehouses, auxiliary commerce, vessels in the South Sea, the opening of Buenos Aires with concession of an important extent of ground, etc.

This combination of privileges gave an exceptional situation in the two oceans to British commerce, and, if one considers the length of time which the contract had to run, one begins to regard it no longer as a momentary advantage, but rather as a permanent statute granted to the English nation in the West Indies. The most striking thing in this bargain is the lack of balance between the condition of the two contracting parties: one is openly sacrificed to the other. This situation would be only imperfectly understood if one confined oneself to examining it in itself; but in order to appreciate it justly it is necessary to put back the *Assiento* in the general policy where it serves as a counter-poise to the important concessions of a political nature made by England to Philip V. The latter bought, in fact, for the commercial advantages which the monopoly of the slave-trade carried, the right to maintain himself upon the throne of Spain.

The *Assiento* was signed at Madrid by Lexington and the Marquis of Bedmar, March 26, 1713. We have this time no doubt regarding its legal character, for we are in the presence of a true treaty. The evolution of the institution is definitely achieved. The two sovereigns not only associate themselves together each for a quarter in the operations to be undertaken, but again the *Assiento* is not concluded directly with the future *Assientists*, but with Her British Majesty. It is Queen Anne who offers, in the name of persons whom she shall later designate, to execute the forty-three articles of the treaty. The personality of the *Assientist* disappeared in the

presence of her own. If, therefore, any difficulty rises with regard to the interpretation or the execution of this *Assiento*, it can be decided only between Crown and Crown, just as negotiations are carried on from Crown to Crown between plenipotentiaries provided with instructions and with regular powers. The Spanish Government has therefore bound its hands more than it had ever done; it is no longer the master of an enterprise so essential to its colonial life; the contractor which it must accept can treat with it from power to power, and the greatest difficulties did not cease to result from it.

The *Assiento* was approved and ratified by His Catholic Majesty, countersigned by the secretary of the Council of the Indies, approved and accepted in an official interview by Lexington, in the name of Her Britannic Majesty, before the royal notary. If doubt could arise regarding the international value of this document, the mention which is made of it in the treaties of London, Madrid, and Utrecht, with insertion of its most important clauses, suffices to assure to it all its scope, for it was considered as making an integral part of these treaties themselves.

It appears, however, that Philip kept a considerable advantage by maintaining his participation in the affairs of the company. This participation implied that the *Assientist* should submit to his verification and give the accounts to his royal partner. His Catholic Majesty had to appoint two directors at London, one at Cadiz, and two in the Indies, to interpose in the commercial operations; but the English had taken care to specify that they could "only interpose" and could not decide. As to the accounts, they were to be every five years approved and liquidated by the ministers of Her Britannic Majesty and those of His Catholic Majesty. It was easy to foresee, being given the independence of future *Assientists*, that these accounts would never be furnished. The *Assiento* was confided by Her Britannic Majesty to the South Sea Company whose creation had caused so great anxiety at Seville. It need not be said that this company promised to confine its activity to the role which was confided to it and gave up every establishment in the Pacific. It played a most important role in England. Conceived as an

organism destined to liquidate the debts contracted by the nation during the war and whose capital was represented by its shares, having the High Treasurer at its head and numbers of political men among its directors, its management raised the most violent criticism in the press of the United Kingdom. It was able at first to obtain from the Government the relinquishment of the privileges that it had reserved to itself in the treaty, it claimed even, without succeeding in it, that the king of Spain should also cede to it the quarter interest which he had in the enterprise and put in tutelage William Eon, the first director whom His Catholic Majesty sent to London to represent his interests.

But soon the affairs of the company were in jeopardy. In 1720, a great crash, due in part to embezzlements and especially to the political hatred of the Whigs, who returned to power at that time, caused the failure of its financial designs. The commercial development of the *Assiento* was apparently no more successful. The directors cared little for the slave traffic whose profits, however considerable, appeared a small matter in comparison with the incredible profits from the contraband trade. They devoted themselves almost exclusively to the commerce of merchandise, to the great detriment of the shareholders, whose dividends were always insignificant.

They could not, in fact, carry on the account the proceeds of the contraband trade, and the whole result of this vast enterprise was changed into private profits; but, in fact, these were distributed throughout the whole English nation: London commerce shared in the whole of it in such a manner that in spite of libels and pamphlets the company resisted and maintained itself. It was forced, however, to struggle against its own countrymen; the English colony of Cadiz saw its total of affairs diminishing, and the inhabitants of Jamaica, whose fortune had been formerly in the smuggling trade, saw themselves in part dispossessed of it. They soon perceived at Madrid that the English *Assiento* would be the ruin of the commerce of Seville. Galleons and fleets no longer found an outlet for their merchandise, and the economic decadence of the Peninsula was accentuated with frightful rapidity. Moreover, they promptly enough forgot that the *Assiento* had been the ransom of

the monarchy and only thought of reducing the advantages granted. During the whole of the first half of the eighteenth century Spanish diplomacy struggled in this sense, suspending the *Assiento* to bring the English to terms when complications of European policy made the latter fear a diplomatic rupture, and not hesitating to have recourse to force to rid themselves of a ruinous economic yoke. The war of 1739 between Spain and England was brought about by Spanish pretensions to exclude English merchant vessels from its territorial waters and the seizure in the port of Havana of the annual vessel of license, the *Prince Frederick*. There is not a diplomatic negotiation in the course of these forty years (1710-1750) in which difficulties between the Spanish Government and the South Sea Company are not taken up and discussed interminably. Thus it happened at the Congress of Soissons where the Spanish plenipotentiaries acquired convincing proofs of the smuggling trade of the directors, and, at the time of the treaty of Seville, when the commissioners, appointed on both sides, devoted long sittings to the examination of the counterclaims of the company and of the Council of the Indies.

Although upheld in this incessant struggle by France and other maritime powers who suffered from English absorption of the trade with America, Spain had to deal with too strong an adversary and could not extricate herself from the shackles which she had accepted. Geraldino, the successor of William Eon at London in the office of director of the company for the interests of His Catholic Majesty, displayed an activity and capacity which later procured for him the post of ambassador. He succeeded in considerably cramping the contraband trade of the directors and even obtained some embryonic accounts. Comptrollers sent to America denounced alike the frauds of the *Assientists* and of their agents; but it was too late. The agencies had become genuine storehouses of merchandise, at the same time they were bureaus of information for the city traders and counting houses for the London bankers. The entire trade of America lay in the hands of the English nation; there was no agglomeration of the new continent whose productions, needs, and

means of satisfying them, it did not know better than the corporation of the merchants of Seville had ever known them.

At the time of the treaties of Aix-la-Chapelle in 1748 and of Madrid in 1750, England gave up the possession of the *Assiento* which she had enjoyed for more than forty years; for, in spite of interruptions and suspensions, she had never ceased her contraband trade, even during the war. This relinquishment was esteemed as a diplomatic victory by the Spaniards, although they had consented to pay the English company an indemnity of one hundred thousand crowns. It was much for them indeed to regain their commercial liberty, but one may be permitted to doubt whether the English would have consented in reality to a very great sacrifice. They had diverted to their advantage the trade of the two Americas, and nothing is more difficult than to change an established commercial current. They remained the usual furnishers of manual labor and manufactured products in the Spanish colonies.

Moreover at this time they had scarcely any more need of the *Assiento*, for another reason. The colonies of North America began to play, and more easily, the part of Jamaica. They had a merchant marine and land communications with the Spanish domains. Lastly, commercial liberty was gradually being established. The *Assiento* became, therefore, even for England, a useless point of friction, in its relations with Spain, and certain signs tend to prove that she gained rather than that she lost by relinquishing it.

THE LAST ASSIENTOS — CONCLUSION.

The Spanish administration, taught by the difficulties of an international character which it had encountered for nearly a century, came back, after Aix-la-Chapelle, to the decision already taken in 1701, viz., to restore the slave-trade to the sphere of internal law from which it should never have issued. It was resolved to confide the enterprise only to Spaniards and, to avoid the disappointments formerly experienced in contracting with too audacious *Assientists*, the exploitation was divided among several partial *Assientos*, each one assigned to a particular region of its domains. It is proper to add that foreigners, English especially, French sometimes, often

became, under Spanish names, the furnishers of the American colonists.¹⁸

Moreover, the question lost much of its ancient interest with the progressive adoption by the government of Madrid of a more liberal colonial policy. Insensibly, after the accession of Charles III, the ports of the peninsula were open to American commerce; the auxiliaries of foreigners, without, however, proclaiming commercial liberty between Europe and America, ceased to be so systematically refused. The *Assientos*, deprived of their international character, lost their political aspect and no longer raised any but economic questions relative to the distribution of manual labor, to the development of the poorest countries, and were finally lost in the general liberty of commerce and of the slave-trade when physiocratic ideas had gained the minds of the rulers in the Iberian peninsula. It was already only a memory when humanitarian ideas, which were to lead to the abolition of the slave-trade and the condemnation of slavery, triumphed.

Since that time, the slave-trade has been prohibited by the voice of civilized nations and slave-traders classed with freebooters and pirates. Colonizing peoples have resumed, more or less humanely, the exploitation of black labor in the improvement of their domains. Diplomatic history has related the disputes to which the counter-claims of France and England have given place in affairs of searching vessels, suspected of being engaged in the slave-trade, and international law pays scarcely any attention to it except to ascertain the bearing and the results of the Brussels Conference. It is somewhat curious, however, that the institution does not appear to have deserved the attention of historians until after it had received its death blow, and that one should be so little interested in the means by which a whole race of men (twenty millions of individuals at the lowest estimate) should be enslaved and decimated in the course of three centuries of official and administrative slave-trade.

In terminating this study, which touches throughout the diplomatic history of Europe, the relations of which are so closely con-

¹⁸ Consult for the history of the last *Assientos*, the work of A. Saco, *Historica de la raza Africana en el nuevo Mundo*, and Vol. III of the author's work.

nected with the economic history of the New World, there seems to us nothing better than to recall with bold strokes the scope of that administrative and international institution which has ceased to exist and which was the *Assiento* of slaves.

This institution, sprung from a favor of Charles Fifth to one of his courtiers, has successively become an element of the financial administrative organization of the Spanish monarchy, then, a factor in international negotiations, lastly, an essential element of the diplomatic life of the maritime powers of the eighteenth century. It takes up more particularly public international law and general colonial history. Its study alone clearly demonstrates the arbitrariness and absurdity of the celebrated doctrine of colonial compact and reciprocal exclusivism. Thanks to England, which alone was able fully to realize what Holland, Portugal, and France had tried before, the narrow and selfish legal regulation which bound the Castilian Indies to the mother-country became only a fiction. Much more even than that of the liberal economists, it is the proof furnished by smuggling vessels which decided the conversion of the Spaniards to ideas of commercial liberty.

And yet, by a curious contrast, the *Assiento*, which, on one hand, undermined and destroyed insensibly all the efficacy of the Spanish-American colonial compact, appears indeed, on the other hand, to have determined the possibility of its maintenance. The duration of this political and economic delusion seems in fact improbable. If it is possible to conceive of the establishment of reciprocal exclusivism, when it is a question of a few islands, as the French Antilles, subject to the rule of a strong, productive and rich mother-country, and if it is necessary, even under these conditions, to state undeniably its disadvantages and to note the inevitable derogations and the continual defeats which were inflicted on it, one asks with astonishment how nearly the whole of two continents has been able to endure the commercial and economic burden imposed upon them by Spain. More and more feeble, poorly armed, engaged beyond her strength in continual European enterprises, this monarchy would have been in no condition, and realized it very well, to repress a general rebellion nor perhaps a local revolt. On the other hand, it

was absolutely impossible for her to supply the needs of her vassals beyond sea, and yet she claimed the right to impose upon them a purely passive attitude, to forbid them all business with the foreigner whom she made, with regret and very inadequately, the selfish and grasping medium, by way of Cadiz. If the dogma of colonial exclusivism had been worked out with a strict method, and if, not satisfied with prohibiting Americans from all manufacturing production, they had still succeeded in oppressing them completely in their trade and their exchanges, all liberality of life, all comforts, all riches would have been refused to them for the sole benefit of the corporation of merchants of Andalusia. There is no doubt, therefore, that the secession of the Spanish-American colonies would have been brought about long before the nineteenth century.

The *Assiento* was the safety valve; through it America could share, thanks it is true to great pecuniary sacrifices, in the progress of Europe, receive its products, develop in part its aptitudes. The *Assiento*, by weakening the Colonial Compact, by preventing it from developing its extreme results, permitted it to live, and guarded it from sinking in the midst of some violent crisis as quickly as it would otherwise have done.

G. SCELLE.

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EDITORIAL COMMENT

EDWARD VII.

In international law, forms of government are indifferent and the possession of sovereignty is the requisite of statehood; independence and equality its corollary. An empire becomes a republic or a republic is converted into an empire without affecting the international personality of the state; the president changes, the emperor passes away, but the state whereof he is the organ undergoes no perceptible change in international law. International relations as distinct from the legal nature of the state are profoundly affected by the change of rulers and the accession of one monarch or the death of another is often an international event of the utmost significance.

The death of Edward VII has plunged the vast British Empire into mourning and the expressions of grief, sympathy and regret are not con-

finer to the English speaking peoples, for the late king had not only used his constitutional power with wisdom, moderation and tact in domestic affairs, but had so conducted himself in delicate matters of foreign policy as profoundly to influence international relations.

His long novitiate as Prince of Wales, where he represented the crown on all important occasions, fitted him to perform with ease and dignity the duties of his nine years of kingship from 1901 to 1910; his wide personal acquaintance with all classes of his fellow countrymen; his knowledge of the strength and weakness of English character; his sympathy as generous as it was profound and outspoken, with all movements tending to improve conditions, assured him the confidence of his subjects from the moment of his accession to the throne and inclined them to judge kindly, if not wholly to overlook, the misdeeds of one peculiarly exposed to temptation. An average Englishman himself, he understood the average Englishman and he truly represented on the throne the Englishmen throughout the kingdom and the empire. It is thus easy to understand how he succeeded in pleasing the average Briton.

But King Edward was equally successful in the domain of foreign affairs and for like reasons. The foreigner he knew and appreciated as the Englishman; he spoke the foreign languages; he travelled widely and mingled freely with all classes of society, so that the ambitious hopes and prejudices of the foreigner were well-nigh as familiar to him as the peculiar traits of his fellow countrymen. Familiarity engendered clear understanding, not contempt, and a sympathy for the neighbors and associates of the British people, a respect for their good qualities, and a desire to administer to their prosperity, disarmed opposition abroad just as it created an affectionate regard for him at home.

It is well known that Edward was opposed to extreme measures against the Boers of South Africa; that he facilitated the settlement of the South African question upon terms acceptable to the victor and the conquered, that he was unwilling to be crowned while the Empire was at war; that he favored the grant of self-government to the Transvaal and the Orange River Colony, and it is a pity that his days were not prolonged to see the fruition of a liberal policy in the appointment of General Botha, formerly commander-in-chief of the Transvaal forces, who took his oath as prime minister of the South African Confederation on June 1, 1910.

His accession found the rivalry between Great Britain and France as pronounced as in past generations; his death found the two countries friends and allies in a common progress by an *entente cordiale* that had

withstood more than one assault. Mutual distrust reigned at London and St. Petersburg, but as in the case with France, Russia and Great Britain buried their differences and harmony exists where formerly discord blocked the path of progress. The Island Empire of Japan has felt the need of English support and the relations between the two countries have become close and intimate. With Germany alone the future is troubled.

It is not without reason that he has been termed the Peacemaker, for he was neither the cause of dissension at home nor abroad, and his influence was thrown for the cause of peace where war prevailed, and for the maintenance of peace where peace existed. The average man with wide knowledge, generous sympathies, infinite tact and moderation has left a deep impress on the world at large.

From another standpoint, the reign of Edward was remarkable, for he has shown that the king as such is a force at home and the visible bond of union between the United Kingdom and the colonies. George IV brought the crown into contempt; the fourth William did little to raise its prestige, and the retirement of Queen Victoria seemed to suggest that the crown had lost its usefulness in the constitutional system of England. The conduct of Edward as king without overstepping constitutional restraints showed that the crown has not spent its force at home, and that loyalty to a self-respecting and therefore respected king is the bond which binds the self-governing colonies to Great Britain and the empire.

May the son tread in the footsteps of the father, and may his reign make for international righteousness and peace.

FOURTH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

The American Society of International Law held its Fourth Annual Meeting at Washington, in the New Willard Hotel, April 28-30, 1910. The programme already furnished the members and printed in the January number of the JOURNAL, pages 188-190, was adhered to and, with two exceptions, the papers as announced in the programme were presented and discussed. The Honorable Charles Nagel was prevented by official business from attending the opening session and the Honorable Thomas C. Dawson was unfortunately too ill to be present.

It is not for the JOURNAL as the organ of the Society to pass judgment upon the papers, but it certainly is permissible to state that they were

all interesting as well as scientific and that they are valuable contributions to the various phases of the general question: *The Basis of Protection to Citizens Residing Abroad*.

The Programme Committee limited the meeting to a single subject, divided into appropriate headings, in order to give unity and consistence to the Proceedings, in the hope that the papers as a whole would be of value as well as of interest to students of the general and special topic. The volume of Proceedings, which will shortly appear, will show that the expectation was more than justified.

The Society expressed the desire at the Third Annual Meeting that something be done in the way of codifying the laws of peace and the special committee appointed by President Root presented two preliminary reports on the subject of the scope and plan of codification and the history of codification. The two reports will be further considered by the committee during the coming year and a final report will be made at the Fifth Annual Meeting in order to see how far and along what lines the codification of the laws of peace should be undertaken by the Society.

Two incidents of the meeting stand out in bold relief and deserve special mention: the annual address of President Root, and the remarks of the President of the United States to the members of the Society at the White House reception. Senator Root considered carefully and in detail the principles underlying the protection to be accorded to Americans abroad, and insisted that what we demand from others we should cheerfully accord. His address is printed in full in the present number of the JOURNAL, p. 517.

President Taft, who is honorary president of the Society, dealt briefly with the same theme, accentuating the necessity of investing the Federal Government with the powers needed to fulfill the international obligations of the United States.

His remarks follow in full:

I am very much honored by your coming here; very glad to welcome you here; glad to know that you have an opportunity to devote this time to an avocation instead of a vocation. The remarks of Mr. Root last night were exceedingly interesting to those of us, chiefly Mr. Knox, who are attempting to bring about something practical in the way of a tribunal which shall invite submission by arbitration. To have an instrument at hand is sometimes a means of inducing its use.

I am personally a little bit more interested in another kind of an instrument that I call to your attention as international lawyers, looking at it from the standpoint of American international lawyers, and that is that Congress should put in the hands of the Executive the means by which we can perform our national

obligations. We should not be obliged to refer those who complain of a breach of those obligations to governors of states and county prosecutors to take up the procedure of vindicating the rights of aliens which have been violated on American soil.

I do not think that any one, however—I will not say extreme, but however strong his view of the necessity of the preservation of state rights under the Federal Constitution—will deny the power of the government to defend, and protect, and provide procedure for enforcing the rights that are given to aliens under treaties made by the Government of the United States. Therefore, it is no excuse, it seems to me, to any one who is a supporter of the Federal Constitution at all to say that he is in favor of a strict construction of that Constitution and the preservation of state rights, in order to defend his refusal to give the central government the means of enforcing its own promises. If it has a right to make promises, I think it has a right to fulfill them, or at least ought to have power to fulfill them. I can not suppose that the Federal Constitution was drawn by men who proposed to put in the hands of one set of authorities the power to promise and then withhold from them the means of fulfilling them.

Now, gentlemen, that is the thing that rushes into my mind the minute I see international lawyers, because it affects the international responsibilities that I for the time being have to meet. I thank you for coming here. I hope that your visit to the capital will result in something tangible in the way of recommendations that will be followed. I congratulate you on coming to a city like Washington at the time of its greatest beauty to give you new inspiration for the support of the national government.

The Society took appropriate action upon the death of Mr. Justice Brewer, vice-president, and the Honorable William L. Penfield, both founders of the Society and members of the Executive Council.

The Society elected as honorary member Mr. T. M. C. Asser of Holland, Minister of State, Member of the Council of State, Member of the Permanent Court of Arbitration, Member of the Institute of International Law, and Corresponding Member of the Institute of France.

All of the officers of the Society were re-elected and the following changes made in order to fill the vacancies created by the deaths of Justice Brewer and Judge Penfield:

Honorable Shelby M. Cullom and Honorable Jacob M. Dickinson were elected vice-presidents

Mr. Jackson H. Ralston of the District of Columbia was elected to the Executive Council to serve until 1912.

The members of the Executive Council elected to serve until 1913 are as follows:

Hon. James B. Angell, Michigan,

Hon. Augustus O. Bacon, Georgia,

Hon. Frank C. Partridge, Vermont,
Mr. A. H. Snow, District of Columbia,
Prof. Leo S. Rowe, Pennsylvania,
F. R. Coudert, Esq., New York,
Everett P. Wheeler, Esq., New York,
Hon. Edwin Denby, Michigan.

Owing to the fact that his duties as Ambassador to Constantinople prevents his attendance at the meetings of the Society at present, Hon. Oscar S. Straus was succeeded as Chairman of the Executive Committee by Hon. John W. Foster.

Mr. George A. Finch was elected Business Manager and Assistant Secretary and Treasurer to succeed Mr. W. Clayton Carpenter who resigned to accept a position on the Agency of the United States in the approaching arbitration between the United States and Venezuela at The Hague.

The following members were elected to the Board of Editors of the JOURNAL for the ensuing year:

James Brown Scott, Editor-in-chief,
C. P. Anderson,
Charles Noble Gregory,
Amos F. Hershey,
Charles Cheney Hyde
George W. Kirchwey,
Robert Lansing,
John Bassett Moore,
George G. Wilson,
Theodore S. Woolsey.

At the annual dinner, held in the New Willard, Saturday night, April 30, 1910, President Root acted as toastmaster, and highly enjoyable and informal addresses were delivered by Hon. Charles Nagel, Dr. James B. Angell, president emeritus of the University of Michigan, Dr. Harry Pratt Judson, president of the University of Chicago, and Mr. Eugene Wambaugh, professor at the Harvard Law School, all members of the Society. President Root made the very comforting announcement that the Society had never solicited funds, that it had never levied an assessment, that it had paid its running expenses for five years, had conducted the JOURNAL as the organ of the Society for the past three years and more, and that it has on hand a balance of some three thousand dollars.

BOUNDARY WATERS BETWEEN THE UNITED STATES AND CANADA

On the fifth of May last the Secretary of State and the British Ambassador at Washington exchanged ratifications of the treaty of January 11, 1909, between the United States and Great Britain, relating to the use of boundary waters and the settlement of questions along the boundary between the United States and Canada,¹ which treaty was negotiated by Mr. Root, when Secretary of State, assisted by Mr. Chandler P. Anderson as special counsel for the Department of State.

The purpose of this treaty, as recited in its preamble, is to prevent disputes regarding the use of boundary waters, and to settle all questions which are now pending between the United States and the Dominion of Canada, involving the rights, obligations or interests of either, in relation to the other, or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise.

This treaty accomplishes these purposes briefly as follows:

It confers on both countries mutual rights of free navigation in all boundary waters on each side of the line, boundary waters being defined as the waters of the lakes and rivers and connecting waterways along which the international boundary between the United States and Canada extends.

It gives the residents on either side of the boundary the same remedies in the courts of each country, for injuries resulting from diversions or obstructions of water on the other side of the boundary that they would have in the courts of the respective countries if they were residents on different sides of State or Provincial boundaries.

It fixes a limit on the amount of water that may be diverted from Niagara River above the Falls on either side of the boundary for power purposes, following the recommendation of the existing International Waterways Commission as approved by resolutions of Congress.

It agrees on an equitable division of the waters of the Saint Mary and Milk Rivers which are partly in Canada and partly in the State of Montana.

It provides for the establishment of an International Joint Commission with power to decide all questions concerning the use and diversion of boundary waters and establishes a code of principles to be applied by this Commission in all such cases.

¹ Printed in the SUPPLEMENT, p. 239.

It confers upon this International Joint Commission jurisdiction to investigate and report on any question arising between the United States and Canada along their common frontier on the request of either country.

It also confers upon this Commission jurisdiction to hear and determine any question whatever between the two countries by consent of both.

The international boundary between the United States and Canada extending from the Atlantic to the Pacific and across the Alaskan peninsula, for a distance of upwards of 3,000 miles, passes through the Great Lakes System and crosses a great number of rivers and waterways flowing from one country into the other.

The present prosperity and future development of the immense regions served by these waters on both sides of the boundary requires that they be available for domestic and sanitary uses and for irrigation and power purposes, and for commerce and navigation. Any such uses by the inhabitants of either country, interfering with similar uses by the inhabitants of the other country affecting the level and flow of the waters on the other side of the boundary, necessarily concerns the interests and rights of the people of both countries. Numerous questions of difference and causes of friction have arisen in the past on account of the injurious results which have been occasioned on each side of the boundary by the uses of these waters on the other side, and difficulties of this nature must invariably become more frequent and of increasing importance as the regions along the boundary become more thickly settled. Good neighborhood and comity between nations demand that the people of each country should be protected so far as possible against injurious uses of these waters on the other side of the boundary, and at the same time it is important that an opportunity be secured on each side for the utilization of these waters for all the beneficial uses above mentioned, not only to meet the requirements of present conditions, but to provide for the greatly increased demands which the growth of population will create in the future. As neither country acting independently of the other can adequately deal with this situation, the uses of these waters, therefore, must necessarily be the subject of joint regulations, if they are to be used to the full extent required for commercial development on both sides, and if international difficulties in the future are to be avoided. The present treaty is designed to meet the requirements of the situation thus presented.

With reference to the waters defined as boundary waters, the treaty recognizes the primary importance of the use of such waters for navigation and commerce, and it provides that no other uses of such waters, in addition to those heretofore permitted or hereafter provided for by special agreement, shall be made except under the authority of the United States or the Dominion of Canada within their respective jurisdictions, and unless they are approved by the International Joint Commission established by the treaty. A series of rules or principles is adopted by the treaty governing the action of the Commission in all cases requiring its approval, and it is provided that in such cases the two countries shall have, each on its own side of the boundary, equal and similar rights in the use of such waters, and that these uses shall take precedence in the following order:

- (1) Uses for domestic and sanitary purposes;
- (2) Uses for navigation, including the service of canals for the purposes of navigation;
- (3) Uses for power and irrigation purposes.

Provision is also made for safe-guarding and indemnifying any interests on either side of the line which would be injuriously affected by uses of such waters on the other side of the line.

With reference to the use of the waters of rivers flowing across the boundary and of rivers tributary to boundary waters, it is agreed that, subject to any treaty provisions previously existing, each Government reserves to itself "the exclusive jurisdiction and control over the use and diversion of all waters on its own side of the line which in their natural channels would flow across the boundary, or into boundary waters." This provision of the treaty, as its terms imply, makes no change in existing conditions, but the treaty proceeds to establish a new rule for the benefit and protection of those interests on either side of the boundary, which might be injuriously affected by the use or diversion of such waters on the other side of the boundary, there being, under existing conditions, no remedy or redress in such cases. This rule is set forth in the treaty as follows:

But it is agreed that any interference with, or diversion from, their natural channel, of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs.

in other words, any one injured on either side of the line, as the result of uses or diversions of waters on the other side of the line, is given the right to recover damages for such injuries, or to take other appropriate proceedings in the courts of the country where the action resulting in such injury took place.

An exception is made, however, with reference to cases already existing, or expressly covered by special agreements between the parties, such special agreements being stated to include any mutual arrangement between the United States and the Dominion of Canada expressed by concurrent or reciprocal legislation.

One article of this treaty deals specifically with the situation at Niagara Falls, it being agreed that "it is expedient to limit the diversion of waters from the Niagara River so that the level of Lake Erie and the flow of the stream shall not be appreciably affected;" and a limitation is put upon the amount of water which may be diverted from the Niagara River above the Falls for power purposes on each side of the boundary. The preservation of the scenic grandeur of the Falls is thus assured during the life of the treaty.

The treaty further provides for an equal apportionment of the waters of the St. Mary and Milk Rivers, which flow across the boundary from Montana into Canada, certain prior appropriations of their natural flow being reserved on each side, and the measurement and apportionment of such waters being under the direction of the International Joint Commission. It is also agreed that the United States shall be entitled to use the Milk River, which ultimately flows back into the United States, as a channel for the conveyance of surplus waters diverted through a canal from the head waters of the St. Mary River into the Milk River. The adjustment of the respective interests on each side of the line in the use of these rivers involved many difficulties and complications, and has long been a matter of difference between the two Governments. The arrangement now arrived at is regarded on both sides as a most satisfactory solution of this difficult question, in that it observes the general principle of equality of division and although it secures to the United States certain benefits which are not shared by Canada, yet these benefits are due to natural advantages favoring the United States, and, on account of natural conditions on the Canadian side, no corresponding benefits could be secured there.

The International Joint Commission, established by this treaty, consists of six members, three appointed on each side, and in addition to

the authority conferred on this Commission with reference to the use of boundary waters the treaty also provides that upon the request of either Government any questions or matters of difference arising between the United States and Canada "involving the rights, obligations or interests of either in relation to the other, or to the inhabitants of the other, along their common frontier," may be referred from time to time to this Commission for examination and report. In cases so referred the Commission is required to examine into and report upon the facts and circumstances, together with such conclusions and recommendations as may be appropriate.

Either country, therefore, may call upon this Commission acting jointly, or upon its own section of the Commission acting separately, to examine into and report upon any question or matter of difference arising between them along their common frontier. It would be difficult to overestimate the advantage and convenience to both countries of having a permanent body, organized as this is with both countries equally represented, upon which either may call for a thorough investigation of any questions of difference involving the interests of their citizens or subjects along the thousands of miles of their common frontier. There are now pending between the two countries many such questions, some of them of long standing, and many more will necessarily arise in the future, all of which, under the provisions of this treaty, may appropriately be referred to this Commission for examination and report pursuant to the authority thus conferred on it as a commission of inquiry. Although the reports of the Commission on the questions so referred are not in themselves binding upon either country, they will inevitably exercise a strong influence upon the ultimate settlement of such questions; and even if the Commissioners are not entirely in accord in the conclusions reached, their reports will at least furnish a common fund of information which will be of immense assistance in reaching a final adjustment by diplomatic negotiations.

In order that the Commission may be enabled to make a full and searching investigation of questions referred to it for that purpose, provision is made in the treaty for empowering it to administer oaths to witnesses and to take evidence on oath whenever necessary in any proceeding or inquiry or matter within its jurisdiction.

The treaty further provides that in addition to acting as a commission of inquiry the International Joint Commission may be called upon to hear and determine any questions or matters of difference involving

the rights, obligations or interests of the United States or the Dominion of Canada, either in relation to each other or to their respective inhabitants, if both Governments agree to refer any such questions to the Commission for decision; the advice and consent of the Senate being necessary to any such agreement on the part of the United States. In case the Commission is equally divided, or otherwise unable to render a decision or finding on any such question so referred, the treaty requires that such question shall thereupon be referred for decision to an umpire, chosen in accordance with the provisions of The Hague Convention of October 18, 1907, for the pacific settlement of international disputes, and such umpire is empowered to render a final decision.

These provisions of the treaty in effect establish a new tribunal of arbitration between the United States and Canada, by which questions of difference arising between them, and which concern only themselves, may be settled by their own representatives without resort to outside intervention.

The treaty is to remain in force for a fixed period of five years from the date of ratification and thereafter until terminated by twelve months written notice given by either Government to the other.

This treaty was approved by the United States Senate on the 3rd of March of last year, and in giving such approval the Senate added a proviso declaratory of the meaning of certain of its provisions with reference to the use of the waters at the rapids of the Sault Ste. Marie. This declaration was subject to the acceptance of the Canadian Government, and in effect opened up the treaty for reconsideration by that Government. Subsequently the Government of the United States took steps by condemnation proceedings to acquire title to the property at the Sault Ste. Marie rapids with reference to which the proviso had been added by the Senate, thus removing all difference on that ground. Meanwhile, however, the opportunity thus offered to reconsider the treaty had been taken advantage of by local interests on the Canadian side elsewhere along the boundary and new objections had been raised as to certain other provisions of the treaty. This situation necessitated renewed negotiations of a delicate character which were undertaken by Mr. Knox, the present Secretary of State, and have now been carried through to a successful issue under his direction assisted by Mr. Anderson, so that the treaty will now go into effect in its original form, as approved by the Senate.

THE EXECUTION OF CANNON AND GROCE IN NICARAGUA

The note of the Secretary of State dated December 1, 1909, to the Nicaraguan chargé d'affaires (reprinted in the Supplement, p. 249) terminating diplomatic relations between that country and the United States has been variously regarded. A section of the press expressed the opinion that the growing feelings of confidence and good will on the part of Latin-American countries toward the United States had thereby been endangered, while certain criticisms in England were calculated to throw doubt upon some principles of international law which the note seems to have taken for granted.

We are not here concerned with the question of diplomatic policy involved in the action taken. The language of the note was perhaps more direct than may have been essential, but few will venture to assert that the provocation was overestimated.

What interests us most, however, are the questions of international law involved in the execution of the two American citizens, Cannon and Groce, who, we assume, were duly commissioned officers in the service of the revolutionary party.

It is often asserted that when a citizen takes up arms against a nation with which his own state is at peace, he completely forfeits his allegiance and his right to protection. Certain proclamations issued by our Presidents during the Cuban revolutions of the forties and fifties warned all citizens that when aiding the insurgents they must not expect "interference of this Government in any form on their behalf, no matter to what extremities they may be reduced." That formula has since been abandoned. The relation of the individual to his native state is a status created by public law, and his temporary allegiance to another government or *de facto* political body will not *so ipso* divest him either of citizenship or the right to protection. Furthermore, a nation owes no duty to a foreign state to take affirmative steps to prevent its citizens, *quâ* individuals, from enlisting in a hostile army. It may well be that the citizen becomes thus guilty of disloyalty to his native state, but if his noxious acts have been repressed with undue severity by the foreign state, it lies with the native state alone to judge how far its subject has lost the right to protection.

The tendency of established government is to treat all rebels as outlaws, but though the Hague rules do not apply to bodies without belligerent character, there has been a gradually crystallizing body of precedents in favor of according the rights of war to individuals constituting part

of an organized force representing the popular will of at least a definite portion of the territory of the state. Hall says that "as soon as a considerable population is arrayed in arms with the professed object of attaining political ends, it resembles a state too nearly for it to be possible to treat individuals belonging to such population as criminals." Our Supreme Court has reached a similar result in the case of the *Three Friends*, by recognizing war in the *material* as well as in the *legal* sense and distinguishing the former from mere lawlessness. In the present case, President Taft, in his last annual message, referred to the revolution as being "in control of about half of the Republic."

Of the right to inflict penalties and imprisonment upon persons captured in the forces of an armed uprising there would seem to be no doubt. But the claim to exercise harsher measures against aliens than against natives on the ground that they have no legitimate interest in the conflict is more than compensated by the fact that, owing no allegiance, their conduct cannot be denominated treasonable. To execute them after barbarous cruelties (as appears from the note to have been reported to the Secretary of State in the present instance) and without trial, or after a trial constituting a bare formality, is in derogation of those rights which the United States Government has, on past occasions, successfully made the subject of international claims, notably under the convention with Mexico of 1868.

It has been broadly recognized that privateersmen in the service of an insurrectionary force may not be dealt with as pirates. It would appear to be a logical extension to apply a similar rule to distinguish revolutionary from bandit forces in hostilities upon land.

THE UNITED STATES AT THE HAGUE COURT OF ARBITRATION

• • *The North Atlantic Coast Fisheries Arbitration*

As the JOURNAL goes to press the long standing dispute between Great Britain and the United States concerning the correct interpretation of the Treaty of 1818 is being submitted by American and British counsel to the definitive determination of the Permanent Court of Arbitration, composed of M. Henri Lammasch of Austria, president, M. Luis M. Drago of Argentine, Mr. George Gray of the United States, Sir Charles Fitzpatrick of Great Britain, and M. A. F. de Savornin Lohman of Holland. The court thus constituted met at The Hague, June 1, 1910.

The JOURNAL has in previous numbers devoted editorial space to the controversy (see Vol. I, pp. 144 and 963, and Vol. III, p. 461) and the reader is referred to them for comment upon it. Article I of the Treaty of 1818, which is to be interpreted by the Tribunal, and the seven questions submitted to the Tribunal for decision are contained in the Special Agreement concluded between the United States and Great Britain January 29, 1909, pursuant to the provisions of Article II of the General Arbitration Treaty between the two countries of April 4, 1908. The Special Agreement has also been printed previously in the JOURNAL (see SUPPLEMENT, Vol. III, p. 168) and the reader is referred to it for an adequate statement of the issues involved. The purpose of the present note is merely to call attention to the arbitration while in progress, but a subsequent issue will contain a leading article on the subject and the text of the award of the Tribunal as soon as the case is decided.

The Orinoco Steamship Company Arbitration

On September 20th next, the Permanent Court at The Hague, composed of M. Henri Lammasch, president, M. Auguste Beernaert of Belgium, and Senor Gonzalo de Quesada of Cuba, will meet to hear arguments, consider and decide the case of the United States against Venezuela concerning the Orinoco Steamship Company. As in the case of the North Atlantic Fisheries Arbitration, the JOURNAL refrains at present from expressing an opinion upon the merits of the questions involved, preferring to record the judgment of the Permanent Court at The Hague than to suggest to the august tribunal what its judgment should be.

The various cases of the United States against Venezuela have been discussed at length in previous editorial comments to which reference is made. (See Vol. III, pp. 436 and 985.) It is sufficient to state that this case is the only one of the five pending at the departure of President Castro from Venezuela which has not been settled by direct negotiation and is, therefore, to be submitted to arbitration in accordance with the provisions of the protocol of February 13, 1909, between the United States and Venezuela. This protocol is printed in the SUPPLEMENT (Vol. III, p. 224) and the reader is referred to it for the terms of submission. The various periods mentioned in the protocol for the submission of the cases, counter-cases, arguments and the date for the meeting of the arbitral tribunal have been extended by exchanges of notes to the present arrangement under which the tribunal meets September

20 next instead of within twelve months from the date of the protocol. Upon the decision of the case, the JOURNAL will publish a leading article concerning it, and the text of the award will be printed in the SUPPLEMENT.

WILLIAM L. PENFIELD

The passing away of a member of the American Society of International Law so eminent, both for learning and for practical service, in the domain of international affairs, as was the late Judge Penfield, is an event that obviously deserves to be commemorated in the Society's records.

William L. Penfield was born in the State of Michigan on the 2nd of April, 1846. His parents, who were natives of New England, were of English extraction. During his boyhood, which was spent on a farm, he attended the neighboring public schools; but he early became desirous of larger opportunities, and, after he had taken a course at Adrian College, he was entered as a student at the University of Michigan. Here, besides pursuing the regular classical curriculum, he devoted himself to studies in modern languages; and in 1870 he was graduated with high honors. Immediately afterwards, he was invited to become an instructor in Latin and German at Adrian College. Accepting this offer, he held the position for two years; and during this time, in pursuance of a resolution long cherished, he fitted himself for the practice of the law. He was admitted to the bar, at Adrian, in 1872. In the following year, as the result of causes somewhat personal and accidental, he removed to Auburn, in Indiana; and there he remained, marrying and making the place his home, till he was called to Washington.

Judge Penfield's advancement in his profession was steady and sure. He soon secured a large clientage in the State and the Federal Courts. He also discharged various public functions, official and unofficial, such as those of city attorney, member of the Republican State Committee, presidential elector and electoral messenger, and delegate (in 1892) to the National Republican Convention. In 1894 he was nominated by the Republicans as their candidate for judge of the thirty-fifth judicial circuit of Indiana, and he had the satisfaction of being elected by the largest majority ever given to a judicial candidate in that circuit. In a memorial lately spread upon the records of the court in which he presided, his brethren at the bar have borne testimony to his unflinching courtesy, his "unswerving correctness of attitude," his "studiousness,

his industry, and his profound knowledge of the law," at the same time declaring that "as a lawyer he always measured up to every requirement of the profession, and as a judge was actuated by a deep sense of right and a devotion to impartial justice."

In the spring of 1897, Judge Penfield resigned his judicial position in Indiana in order to accept the post of Solicitor of the Department of State of the United States, to which he was appointed by President McKinley. He entered upon the discharge of his new duties at a moment when many delicate and important questions were pending; and he was destined within the next few years, as an officer of the Department of State, to bear his part in dealing with various important crises in international affairs. In a year there came the war with Spain; then followed the troubles in China; and still later the war between Japan and Russia broke out. Meanwhile, difficult situations had been created in the western hemisphere by the blockade of Venezuelan ports by certain European powers, and by chronic disturbances, resulting in the prostration of governmental authority, in Santo Domingo. It is needless to say that by reason of these events, the labors and responsibilities of Judge Penfield's office were greatly enhanced; nor will there be any doubt, on the part of those who are acquainted with the facts, that his own individual labors and responsibilities, which were by no means confined to the ordinary work of his office, were exceptionally increased as the result of the special confidence which his official superiors felt in his abilities and his personal character.

In no part of his work did Judge Penfield exhibit a more absorbing interest than in that which related to the settlement of international disputes by arbitration. His record is in reality distinguished by his achievements in this direction. While others talked of arbitration, he made it a reality; and he had the happiness to appear as counsel for the United States in the first case — that of the "Pious Fund" of the Californias — before the Permanent Court at The Hague. This was, however, only one of the many arbitral proceedings in which he acted as the representative of his Government. He appeared again before The Hague Tribunal in the Venezuelan Arbitration in 1903-4; and at other times and before other tribunals, he represented demands against Peru, Haiti, Nicaragua, Guatemala, Salvador and Mexico. The judgments which he obtained for the United States aggregated more than two million dollars; but to his mind, while the award of substantial damages attested the validity of the demand, the greatest satisfaction, no doubt,

was produced by the reflection that the end had been attained by a fair and open trial, with every opportunity to the parties to be heard.

In July 1905 Judge Penfield was sent as a special commissioner to Brazil. On his return to the United States he resumed the discharge of his regular duties; but, in the following year, he decided to lay down the burdens of office and to engage in private practice. He opened an office in Washington, and was soon retained in important cases. He was also appointed professor of international law and of the foreign relations of the United States in the postgraduate law school of Georgetown University. He died in Washington, May 9, 1909, prematurely, in the full tide of professional success.

Judge Penfield was a man of admirable gifts. While not professing to proceed by the intuitions of genius, he possessed to an unusual extent the faculty of logical analysis, which, united with patience and industry, enabled him to master the subject in hand, and, when he had mastered it, to present it with clearness and force. He was also persuasive. Versed in literature, and practised in writing and in speaking, he knew how to convey his thoughts in appropriate language, and, while sturdy in the maintenance of his views, bore himself with a courtesy that was innate and never lacking in dignity. But, if there was one trait more than another by which he was distinguished, it was his overruling sense of justice, a sense in his case cultivated and enlightened by study and by experience but ever directed to the ascertainment of the truth. In devoting to this ideal, unobscured by unworthy or extraneous considerations, his well-trained faculties, he has left behind him an example worthy not only of commemoration but also of imitation.

DEDICATION OF THE PAN-AMERICAN BUILDING

On April 26, 1910, the future home of the International Bureau of the American Republics was formally dedicated at Washington in the presence of the President and Secretary of State of the United States, representatives of the twenty-one Latin-American Republics, and Messrs. Root and Carnegie, whose interest in and devotion to the cause of the closer union of America have resulted in this outward and visible memorial to western civilization and to Pan-American solidarity.

The idea of a closer union of the American Republics has long been a favorite one of the enlightened and progressive spirits of America, and it is peculiarly appropriate that it be given definite form and effect in

this year of 1910 which thus marks at one and the same time the actual, although non-political, union of America and the progress of Latin-America in the century following the declaration of its independence in 1810. The Fourth Pan-American Conference of July, 1910, to be held at Buenos Aires, is but a more formal and ceremonious manifestation of the spirit embodied in the Pan-American Building of the city of Washington.

The independence of Saxon America was achieved by Washington and the union of the states was in no small measure his work as it was the necessary consequence of his labors. The independence of Latin-America will ever be associated with the name of Bolivar and the union or federation of the Americas was the dream of the younger and more enthusiastic patriot. The conception of the Panama Congress of 1826 was Bolivar's and its failure merely showed that America was not ready for cooperation, not that cooperation was Utopian or impossible. Nations are plants of slow growth and disinterested cooperation is impossible until independence is an undisputed and concrete fact. Almost sixty years passed before the auspicious moment arrived. In 1881 a distinguished Saxon statesman, the late James G. Blaine, proposed, in a justly celebrated and felicitous note,¹ a meeting of the nations at Washington. Postponed for the time being, the conference met in Washington in 1889-90 under the presidency of Mr. Blaine, for the second time Secretary of State. In 1901-2 the conference met in Mexico, and again in 1906 at Rio de Janeiro on the eve of the Second Hague Peace Conference, the character and purpose of which while more international, is hardly more beneficent, certainly not more idealistic or progressive.

The first Pan-American Conference of 1889-90 was thus followed by a second at Mexico in 1901-2 after a long interval: it was quickened into life and given the dignity of a permanent institution by the initiative and sympathy of Secretary Root, who persuaded another American citizen, Mr. Andrew Carnegie, to provide it with a permanent home, just as the Hague Conference was perhaps saved by the timely intervention of President Roosevelt, for which institution Mr. Carnegie's generosity is supplying a permanent palace.

From the interesting addresses delivered upon the opening of the Pan-American Building, significant passages are quoted from those of the President, the Secretary of State, Senator Root and Mr. Carnegie, as

¹ Printed in the SUPPLEMENT, p. 252.

indicating the Saxon viewpoints, and the reader is referred to the elaborate address of the Mexican Ambassador who spoke for the republics of the South.

Secretary Knox spoke in full as follows:

MR. PRESIDENT, LADIES, AND GENTLEMEN: I feel that I am especially privileged in taking part in the auspicious ceremony of the dedication of the building to be devoted to the cause of peace and good will between the Republics of Latin-America. It is more than a privilege, it is a duty incumbent on me to voice the sympathy of the United States in the great work which it is the mission of the International Bureau of the American Republics to accomplish and to give renewed assurance, if such be needed, of the earnest and unselfish purpose of the Government and people of the United States to do all that lies within their power toward the fulfillment of the high task set before you.

The great movements of the people of the earth looking to closer association and truer kinship are often slow of realization. Such movements spring from within. They are not arbitrarily imposed by outward forces. Their primary impulse is the growing conviction of neighboring communities that the development and prosperity of each is in harmony with the advancement of the rest and that between peoples of the same ideals, living under the same political conditions and sharing in a common environment, there is a certain sentiment of unity which moves them to closer intimacy. The growth and fruition of that sentiment is the work of time, of centuries perhaps. Rarely has the seed been sown and the tree matured within the lifetime of a single generation.

The movement in whose confirmation we take part to-day has been exceptionally favored. The reason of its marvelous fertility of development is not far to seek. The soil was prepared a century ago when the colonists of Spanish America established free communities from the Rio Grande to Cape Horn, following their northern brethren of the United States, and the peoples of that vast domain, from being dependents of a common motherland, became fellow-workers in the building up of a scheme of kindred sovereignties. As historical eras are computed those sovereignties are yet young. It is a happy coincidence that at this very time they are commemorating the independence they won a hundred years ago.

Many of those among us were witnesses of the birth of the Pan-American idea in the First International Conference of American Republics held in this capital twenty years ago. We have watched its growth year by year with ardent solicitude. From the first the people of the United States, through their Government and Congress, have lent hearty and effective aid to the great enterprise. The representatives of all the Republics of the West have met, in cordial harmony, under the international Pan-American banner, as the honored guests of the American Union: and this nation, in turn, never unmindful of the sacred duties of a host, has taken part as a simple colaborer in the tasks of the great body politic which has been created by the concurrent efforts of all. It is a logical consequence of that dual relationship that the home of the International Bureau, in which we are to-day assembled, is the gift in a large part of a citizen of the United States to all the peoples of the Western Republics, and that we

of the United States, in common with our Pan-American brethren, accept that noble gift, firm in the conviction that it will be a worthy instrument toward the attainment of the high aims of the International Bureau, and, with devout hearts, we supplicate the Giver of all Good that the efforts of our association may be thrice blessed and through its influence the nations of Pan-America may, year by year, be brought into closer accord and more benevolent community of interests.

Senator Root, whose speech, to quote the President's happy phrase, "was as perfect in its way as the architecture of the building," said in part:

The active interest of President Taft and Secretary Knox are evidence that the policy of Pan-American friendship reinaugurated by the sympathetic genius of Secretary Blaine is continuous and permanent in the United States; and the harmony in which the members of the Governing Board have worked to this end is a good omen for the future.

This building is to be in its most manifest utilitarian service a convenient instrument for association and growth of mutual knowledge among the people of the different Republics. The library maintained here, the books and journals accessible here, the useful and interesting publications of the Bureau, the enormous correspondence carried on with seekers for knowledge about American countries, the opportunities now afforded for further growth in all those activities, justify the pains and the expense.

The building is more important, however, as the symbol, the ever-present reminder, the perpetual assertion of unity of common interest and purpose and hope among all the Republics. This building is a confession of faith, a covenant of fraternal duty, a declaration of allegiance to an ideal. The members of the Hague Conference of 1907 described the Conference in the preamble of its great Arbitration Convention as —

"Animated by the sincere desire to work for the maintenance of general peace.

"Resolved to promote by all the efforts in their power the friendly settlement of international disputes.

"Recognizing the solidarity uniting the members of the society of civilized nations.

"Desirous of extending the empire of law and of strengthening the appreciation of international justice."

That is the meaning of this building for the Republics of America. That sentiment which all the best in modern civilization is trying to live up to we have written here in marble for the people of the American continents.

The process of civilization is by association. In isolation, men, communities, nations, tend back toward savagery. Repellant differences and dislikes separate them from mankind. In association, similarities and attractions are felt and differences are forgotten. There is so much more good than evil in men that liking comes by knowing. We have here the product of mutual knowledge, co-operation, harmony, friendship. Here is an evidence of what these can accomplish. Here is an earnest of what may be done in the future. From these

windows the Governing Board of the International Union will look down upon the noble river that flows by the home of Washington. They will sit beneath the shadow of the simple and majestic monument which illustrates our conception of his character, the character that, beyond all others in human history, rises above jealousy and envy and ignoble strife. All the nations acknowledge his preeminent influence. He belongs to them all. No man lives in freedom anywhere on earth that is not his debtor and his follower. We dedicate this place to the service of the political faith in which he lived and wrought. Long may this structure stand, while within its walls and under the influence of the benign purpose from which it sprang the habit and the power of self-control, of mutual consideration, and kindly judgment more and more exclude the narrowness and selfishness and prejudice of ignorance and the hasty impulses of supersensitive *amour-propre*. May men hereafter come to see that here is set a milestone in the path of American civilization toward the reign of that universal public opinion which shall condemn all who through contentious spirit or greed or selfish ambition or lust for power disturb the public peace, as enemies of the general good of the American Republic.

One voice that should have spoken here to-day is silent, but many of us can not forget or cease to mourn and to honor our dear and noble friend, Joaquim Nabuco. Ambassador from Brazil, Dean of the American Diplomatic Corps, respected, admired, trusted, loved, and followed by all of us, he was a commanding figure in the international movement of which the erection of this building is a part. The breadth of his political philosophy, the nobility of his idealism, the prophetic vision of his poetic imagination, were joined to wisdom, to the practical sagacity of statesmanship, to a sympathetic knowledge of men, and to a heart as sensitive and tender as a woman's. He followed the design and construction of this building with the deepest interest. His beneficent influence impressed itself upon all of our actions. No benison can be pronounced upon this great institution so rich in promise for its future as the wish that his ennobling memory may endure and his civilizing spirit may control in the councils of the International Union of American Republics.

Mr. Carnegie, the generous donor of the building, spoke not merely as a philanthropist but as a surviving member of the first conference, and in the course of his remarks paid a well merited tribute to Secretary Knox's proposed constitution of the Court of Arbitral Justice.

MR. CHAIRMAN, MR. PRESIDENT, DIPLOMATS, LADIES, AND GENTLEMEN: As one of the remaining members of the First International Conference of the American Republics, whose interest in the cause has increased with the years, no duty could be assigned me more pleasing than that I am now called upon to perform by the favor of the Governing Board of the International Bureau of the American Republics — that of participating in the dedication of this beautiful structure to its noble mission of promoting the reign of peace and good will, and of progress, moral and material, over the Republics of this vast continent. Nor would we exclude from friendly cooperation our growing neighbor of the north, who enjoys like ourselves government of, and for, and by the people, should she

in the course of time decide, with the cordial approval of her illustrious parent land, to enter the brotherhood, thus extending it over the entire continent, an area nearly four times as large as Europe. Surely such a spectacle would soon lead the whole civilized world to follow.

Upon such an occasion as this our thoughts naturally revert to the past services of Secretary Blaine, who stands forth preeminent, presiding as he did over the First Conference of the Republics held in Washington, which conference he had called into being. We rejoice that upon these walls a permanent tribute to his memory is soon to appear. His successor, Senator Root (then Secretary of State, and to whom we chiefly owe this beautiful structure), was an honorary president of the recent and third conference and was the pioneer among high officials in visiting our southern brethren in their own countries. Much has he done for the cause, and in due time a similar tribute to him will no doubt be erected. His successor, our chairman, Mr. Knox, is already to be credited with a notable success in suggesting that the International Prize Court, agreed to by the delegates of the eight leading naval powers, be converted into an arbitral court composed of the most eminent jurists of the respective countries, authorized to decide any international disputes brought before it. Should this pregnant suggestion be approved, of which there is strong hope, the world will have at last its greatest need supplied and the young Secretary of State's everlasting monument be thus provided by one stroke of his pen.

* * * * *

I wish to congratulate the twenty Latin nations south of us upon their educational and intellectual progress, their vast resources, and growing prominence and international influence. Their expanding trade and commerce are remarkable. The International Bureau of American Republics is performing a great work in keeping the peoples of the world advised of these matters. I confess that the figures surprise me. These twenty Republics have already 70,000,000 of people, and their foreign trade, which has doubled in the last ten years, amounts to \$2,000,000,000 (not millions, but billions). Trade between our own country and these has also doubled in that time and reaches \$600,000,000. If the Bureau continues keeping the world advised of the progress of Pan-American commerce and Pan-American railways and continues to report such amazing progress and resources, it may soon be questioned whether this twentieth century is after all to be Canada's century. It may be captured, not by the northern, but by the southern part of our continent. My recent visit to the West and the Pacific convinced me that the center nation, winner of the nineteenth century, is still in the race and is not to be regarded as a negligible quantity in the struggle for record progress in the twentieth. In any case, we of the middle portion will heartily congratulate our advancing sister nations, north or south.

Mr. Chairman, fully am I persuaded that the rulers and statesmen of the earth, all of whom are to-day constantly proclaiming their earnest desire for peace, are sincere in their protestations. Why, then, is this universally desired peace not promptly secured? Equally am I persuaded that the true root of the failure lies in the fact that these rulers and statesmen know not each other well. They are strangers, and therefore naturally and mutually suspicious. When a

difference arises, they meet as strangers, knowing not the sincerity, the truthfulness, the keen sense of honor, and the earnest desire for peace of their fellow-statesmen. The French have a proverb—"We only hate those we do not know." The reverse is also self-evidently true—"We only love those we do know."

Two men differ; if strangers, the probable result is strife. Two friends differ; the probable result is peaceful settlement either by themselves, or, failing that, by arbitration of friends, and the two friends become dearer to each other than before. Why? Because neither has assumed to sit as judge in his own cause, which violates the first principles of natural justice. The greatest crime that either man or nation can commit is to insist upon doing that which would consign the judge upon the bench to infamy if he ever dared to sit in judgment upon a cause in which he was an interested party. In nations which will tolerate the duel, its practice is rapidly falling into disrepute, and a court of honor is coming into general use, first to determine whether the two foes are justified in breaking the peace.

One of the chief missions of this palace should be, as their natural home, to draw together the diplomats and representative men of all our Republics and enable them to know each other and learn of the sterling virtues of their colleagues, and especially their earnest desire for the prosperity of all their neighbors and their anxious hope that peace shall ever reign between them. Thus these statesmen will become lifelong friends to whom may safely be intrusted the settlement of any international difference that may arise. Above all, we may expect that between such friends no one would insist upon sitting as judge upon his own cause were the other to propose leaving the difference to a mutual friend. This, then, is one of the greatest missions of this international meeting ground in which we are assembled. Nor will its mission be fulfilled until every Republic, and, I fondly hope, Canada also included, shall have agreed to lay aside the sword.

The most momentous declaration ever made upon this subject by the chief of a nation is that of our President recently in New York. He proclaimed that all international disputes should be settled by arbitration; no exceptions. A court of honor should decide whether any dispute involved that phantom of nations called honor. The independence and existing territorial limits of nations would, of course, be sacred and recognized as beyond dispute. He has given us the true solution of the problem of peace against war and placed our Republic in the van, and he is to rank in history with the greatest benefactors of his race.

The crime of war is inherent—it gives victory not to the nation that is right, but to that which is strong.

As I speak there comes to me a new poem, *The New Age*. I quote two verses:

When navies are forgotten
And fleets are useless things,
When the dove shall warm her bosom
Beneath the eagle's wings,
When memory of battles
At last is strange and old,

When nations have one banner
 And creeds have found one fold,
 Then hate's last note of discord
 In all God's world shall cease
 In the conquest which is service,
 In the victory which is peace.

With the words of Washington, the father of our country, in my heart: "My first wish is to see the plague of mankind, war, banished from the earth," I now join in dedicating this home of the Bureau of the American Republics to the highest of all its missions, the abolition of the crime of killing man by man as a means of settling international disputes.

In closing the formal exercises, President Taft said:

I wish to congratulate our sister republics upon the marvelous progress that they have made in the last two decades — in material advancement, and in that without which either spiritual or material advancement is impossible, in peace, in the stability of their government, in the consciousness that it is the annals of a peaceful, happy country that are tiresome. The few instances of disturbed countries that remain are being made less in number by the wonderful progress and prosperity of those who preserve the stability of their government by the peaceful rule of the majority.

It goes without saying that in the foreign policy of the United States its greatest object is the preservation of peace among the American Republics. And it goes also without saying that the organization of the Bureau of American Republics, and the making of this family of American Republics, are events that tend more than anything else to the preservation of that peace, for we twenty-one Republics can not afford to have any two or any three of us quarrel. We must stop. And Mr. Carnegie and I will not be satisfied until all nineteen of us can intervene by proper measures to suppress a quarrel between any other two.

Of course, we are not all philanthropists, as Mr. Carnegie is, and we have an additional interest in the Bureau of American Republics and in the cultivation of good will between the twenty-one Republics in that we hope each of us may profit by the trade which will be promoted by our closer relations.

This is the centennial year of many of the twenty-one Republics, and it is very fitting that the building which represents their closer union should be dedicated in this year.

There is only one other happy feature of the occasion to which I wish to refer, and that is the absolute fitness for the making of this Bureau a success, of Mr. John Barrett. He was born for it, and I hope he will continue to make it more and more useful as the years go on.

For the present Secretary of State, I want to say — and I speak with modesty, because he and I are in the same administration — there is nothing that this Government can do to promote the solidity of the union between the twenty-one Republics that meet here in this building in joint ownership, that he is not willing and anxious to do. And, if I have any influence with the administration, I propose to back him to the full in carrying this policy out.

The dedication of the Pan-American Building is in the best sense of the word an international event, deeply concerning the future interests and intercourse of the twenty-one Republics of the Western Hemisphere. It is the visible evidence of the progress of a century towards closer union and clearer understanding. It is likewise a guarantee for the future and will doubtless generate the sentiment of solidarity and fellowship which it proclaims and perpetuates.

RAILWAYS IN CHINA

I. The Hukuang Loan Agreement

Late in May last the United States Government learned that an understanding had been reached between important British, French and German financial groups supported by their Governments by which they were to furnish funds for the construction of two great railways in China. The United States, believing that sympathetic cooperation between the governments most vitally interested would best subserve the policies of maintenance of Chinese political integrity and equality of commercial opportunity, suggested that American cooperation with the powerful international financial group already formed would be useful to further the policies to which all were alike pledged.

The American Government pointed out that the greatest danger at present in China to the open door and the development of foreign trade arose from disagreements among the western nations, and expressed the opinion that nothing would afford so impressive an object lesson to China and the world as the sight of the four great capitalist nations — Great Britain, Germany, France, and the United States — standing together for equality of commercial opportunity.

An agreement was soon reached with the Chinese Government that American bankers should take one fourth of the total loan and that Americans and American materials should have all the same rights, privileges, preferences, and discretions for all present and prospective lines that were reserved to the British, German, and French nationals and materials under the terms of their original agreement, except only the right to appoint chief engineers for the two sections about to be placed under contract. As to the latter point China gave assurance that American engineers would be employed upon the engineering corps of both roads and that the present waiving of America's right to chief

engineers would in no way prejudice its rights in that regard when future extensions should be constructed. After several months of continuous negotiation, the right to such American all-round equal participation has been acknowledged and a final settlement on this basis has been completed.

The grounds for this energetic action on the part of the United States Government have not been generally understood. Railroad loans floated by China have in the past generally been given an Imperial guarantee and secured by first mortgages on the lines constructed or by pledging provincial revenues as security. The proposed hypothecation of China's internal revenues for a loan was therefore regarded as involving important political considerations. The fact that the loan was to carry an Imperial guarantee and be secured on the internal revenues made it of the greatest importance that the United States should participate therein in order that it might be in a position as an interested party to exercise an influence equal to that of any of the other three powers in any question arising through the pledging of China's national resources and to enable the United States, moreover, at the proper time again to support China in urgent and desirable fiscal administrative reforms, such as the abolition of *likin*, the revision of the customs tariff, and general fiscal and momentary rehabilitation.

II. *The Manchurian Railways*

As is well known, the essential principles of the Hay policy of the open door are the preservation of the territorial and jurisdictional integrity of the Chinese Empire and equal commercial opportunity in China for all nations. The United States Government believed that one of the most effective, if not the most effective way to secure for China the undisturbed enjoyment of all political rights in Manchuria and to promote the normal development of the Eastern Provinces under the policy of the open door practically applied, would be to take the railroads of Manchuria out of Eastern politics and place them under an economic and impartial administration by vesting in China the present ownership as well as the reversion of its railroads; the funds for that purpose to be furnished by the nationals of such interested powers as might be willing to participate and who were pledged to the policy of the open door and equal opportunity; the powers participating to operate the railway system during the period of the loan, and enjoy the usual preferences in supplying materials.

Such a policy would naturally require for its execution the cooperation, not only of China, but also of Japan and of Russia, who already had extensive railway rights in Manchuria. The advantages of such a plan were obvious. It would insure unimpaired Chinese sovereignty, the commercial and industrial development of the Manchurian provinces, and furnish a substantial reason for the early solution of the problems of fiscal and monetary reform which are now receiving such earnest attention by the Chinese Government. It would afford an opportunity for both Russia and Japan to shift their onerous duties, responsibilities and expenses in connection with these railways to the shoulders of the combined powers, including themselves. Such a policy, moreover, would effect a complete commercial neutralization of Manchuria, and in so doing make a large contribution to the peace of the world by converting the provinces of Manchuria into an immense commercial neutral zone.

The signature of an *ad referendum* agreement between a representative of the Chinese Government and the financial representatives of the United States and Great Britain to finance and construct a railway line from Chinchow to Aigun gave the United States an opportunity to lay this proposal before the Government of Great Britain for its consideration, and the project received the approval in principle of that Government. Germany and China cordially approved the American suggestion. Japan and Russia found the proposal unacceptable in its wider scope. The alternative proposition is still under consideration by the respective Governments concerned.

THE SIXTEENTH ANNUAL LAKE MOHONK CONFERENCE ON INTERNATIONAL ARBITRATION

The sixteenth annual meeting of this conference, which was held at Mohonk Lake, N. Y., May 18th, 19th and 20th, is likely to be remembered as the most significant of the long series of these unique gatherings. Former meetings have equalled it in the number and prominence of their participants; but none has possessed so many of the attributes that make an assembly an accurate index of public opinion. Among the three hundred persons present were representatives not only of every phase of the peace movement but of practically every important calling. The Business Committee which presented the platform consisted of three judges, four lawyers, three educators, two editors, three business men, a national commissioner of labor, a brigadier-general, a rear-admiral, a

member of the State Department, an expert in Pan-American affairs, two clergymen and the representatives of three peace and arbitration societies; and all these classes and others were heard on the floor of the conference. Eight nationalities were in evidence, London, Paris, Berne, Christiana, Tokio, Ottawa, Montreal, Toronto, and most of the large cities of the United States from Los Angeles on the west to Jacksonville on the south and Portland, Maine, on the east, being represented. It was a cosmopolitan gathering; and its discussions were equally representative. Conditions in the Far East and in South America; the relation to arbitration of churches, colleges, commerce and labor; limitation of armaments; the duty of the United States in the peace movement, these and other topics were freely brought forward, and all received a sympathetic hearing. But the dominant note of the conference — starting with the opening remarks of Albert K. Smiley, the host, permeating almost every address and finally becoming part of the platform — found its fullest expression when the Solicitor for the Department of State closed his address with these words:

The Secretary of State, the Honorable Philander C. Knox, authorizes and directs me to say officially that the responses to the identic circular note (of October 18, 1909) have been so favorable and manifest such a willingness and desire on the part of the leading nations to constitute a Court of Arbitral Justice, that he believes a truly permanent court of Arbitral Justice, composed of judges acting under a sense of judicial responsibility, representing the various judicial systems of the world and capable of insuring the continuity of arbitral jurisprudence, will be established in the immediate future and that the Third Peace Conference will find it in successful operation at The Hague.

It will be remembered that as early as 1896 and for four successive years the Mohonk Conference inserted in its platform an appeal for the establishment of an international court, and that this subject and the negotiation of treaties of arbitration have been the leading themes at all of its meetings. Last year, the platform particularly urged the United States Government to take the initiative in promoting the establishment of the international court of arbitral justice. It was, therefore, with peculiar satisfaction and appreciation that the meeting received this message from the Secretary of State. The feeling of the Conference and the spirit of its discussions is well expressed in the platform adopted, which is as follows:

The Sixteenth Annual Lake Mohonk Conference on International Arbitration congratulates the people of the United States on the marked progress which the past year has witnessed in the age-long struggle for the substitution of the reign of law for the reign of force in international affairs. It notes with deep satis-

faction the significant announcement of the Secretary of State that the proposed constitution of the International Court of Arbitral Justice recommended to the powers in his identic circular note of October 18, 1909, has been received with so much favor as to insure the establishment of such a court in the near future, and it pledges to the President and the Secretary of State the hearty support of the Conference and invokes the cooperation of men of good will everywhere in bringing this beneficent result to pass.

The Conference has further noted with profound interest and satisfaction President Taft's recent declaration in favor of the submission to arbitration of all matters of difference between nations without reservation of questions deemed to affect the national honor, and the Conference expresses the earnest hope that the President and the Senate of the United States will give effect to this wise and far-seeing declaration by entering upon the negotiation of general treaties of arbitration of this character at the earliest practicable moment.

The Conference reaffirms its declaration of last year respecting the portentous growth of the military and naval establishments of the great powers and calls renewed attention to the fact that the rapid development of the instrumentalities of law and justice for the settlement of international differences furnishes to the statesmanship of the civilized world the long-desired opportunity of limiting by agreement the further increase of armaments. The coming celebration of the one hundredth anniversary of the arrangement between Great Britain and the United States definitely limiting the naval force on the Great Lakes and the St. Lawrence to four hundred tons and four eighteen-pounders calls renewed attention to the continued menace to the peace of the world caused by the prevailing conditions and emphasizes the fact, so well expressed by former President Roosevelt in his Christiania address, that with "sincerity of purpose, the great powers of the world should find no insurmountable difficulty in reaching an agreement which would put an end to the present costly and growing extravagance of expenditure on naval armaments."

The unanimous adoption of this platform by a body including men of every shade of opinion respecting the relation of armaments to peace seems strikingly significant of a growing belief that, whatever the possibility of limiting armaments by mutual agreement, it is as a result of the establishment and successful operation of a real international court that such limitation will most naturally and most easily be effected. Coming from so representative an assembly, the platform can hardly fail to be gratifying to the Department of State.

Other official acts of the Conference were a resolution, based on the address of the Dean of Worcester, urging the churches of America to coöperate with those of Great Britain and Germany in fostering international good will; the appointment of a committee "to consider the best method of properly celebrating the completion of one hundred years of peace between the English-speaking peoples of the Western Hemisphere;" and the following self-explanatory resolution:

Resolved, That a Committee of three lawyers, with power to add to their number, be appointed by the Chair, to report to this Conference in 1911, as to the best method of carrying into effect the recommendation of successive Presidents of the United States, that the United States Government be vested with the power to execute through appropriate action in the Federal Courts its treaty obligations, and generally to furnish adequate protection to alien residents in the United States.

The committee appointed under the terms of the last named resolution consists of Elihu Root, Simeon E. Baldwin and George W. Kirchwey.

A number of noteworthy addresses were made, among them that of the presiding officer, Nicholas Murray Butler; whose careful analysis of the peace movement and powerful arraignment of the arguments advanced by those who from ignorance, indifference or personal gain, oppose or neglect the movement showed that the peace advocate of today is the truly practical person, and that they are "theorists who, grouping as in a fog, assume that mankind must be forever ruled by brute force and cruelty and lust for power and for gain." William Jennings Bryan's eloquent exposition of the forces that make for peace and his appeal that the United States set an example in checking naval expenditure made a strong impression. The address of the Swiss Minister, dealing with the development of aeronautics, raised some interesting points of international law, while the addresses on the international court of arbitral justice have great permanent value for readers of this Journal. Other points were well brought out in the forceful, clear-cut addresses of Charles W. Eliot, L. S. Rowe, John B. Clark, and the Canadian Minister of Labor.

Next to the dominant judicial note, perhaps the most striking feature of the conference was a spirit of agreement and cooperation, one manifestation of which was the report of a Committee¹ appointed by the Conference last year to consider the establishment of a National Peace Council which shall bring into closer cooperation the different peace and arbitration societies of the United States and direct their work into the most effective channels. The Committee, through their spokesman, George W. Kirchwey, expressed strong hope of definite results in the near future. The success of such a plan would be an achievement of no small importance and would be quite in line with the broad policy that has usually characterized the Mohonk meetings.

¹ Consisting of Elihu Root, Andrew Carnegie, Albert K. Smiley, Benjamin F. Trueblood, E. D. Warfield, Lyman Abbott, Edwin D. Mead, George W. Kirchwey, James Brown Scott, and Nicholas Murray Butler.

CONSULAR ADMINISTRATION OF ESTATES OF DECEASED ALIENS.

In the case *In re Ghio*, the Supreme Court of California has recently rendered a decision in which it is held that an Italian Consul General, entitled by treaty to all of the rights and prerogatives of a consular officer of the Argentine Republic, is not given the right under Article IX of the existing treaty between the United States and the Argentine Republic of July 7, 1853, to administer the estate of a deceased intestate countryman in preference to a local public administrator clothed with power to administer in such cases by the State law.¹

The article in question contains the following provision:

If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the Consul General or Consul of the nation to which the deceased belonged, or the representative of such Consul General or Consul, in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs.

The process of reasoning by which the court reaches its conclusion is interesting. It is admitted at the outset that:

The treaty-making power of the Federal Government is so far superior to the law-making power of Congress, that it would authorize the Federal Government to control by treaty the power of the States to confer and limit the right of administration of estates, and the power of the State courts to appoint administrators, so far as the estates of resident citizens of foreign countries are concerned.

Nevertheless, the court later declares that the claim of the consul (the petitioner)

ascribes to the Federal Government the intent, by means of its treaty-making power, to materially abridge the autonomy of the several States, and to interfere with and direct the State tribunals in proceedings affecting private property within their jurisdiction. It is obvious that such intent is not to be lightly imputed to the Federal Government, and that it cannot be allowed to exist except where the language used in a treaty plainly expresses it, or necessarily implies it.

If it be true that the Federal Government may by treaty confer upon a foreign consular officer the right to administer the estate of a deceased countryman, even though Congress lacks the power to do so, the problem whether or not a particular treaty contains such a provision is not to be solved by reference to the effect of its operation upon the local laws of

¹ See Judicial Decisions, p. 727.

a State.² The very language of the Constitution itself announcing the superiority of a treaty shows the fallacy of such a test.³ The Federal Government has for more than a century been in the habit of concluding treaties constantly affecting the local interests of the several States. The advantages of such agreements have sometimes been questioned; but they have never, in a single instance, been pronounced unconstitutional by the Supreme Court of the United States. No treaty has ever been declared void on the ground that its provisions were in excess of the power lodged in the President and Senate.

There have been several cases where courts have decided that a consular officer possessed the right to administer under the provisions of the Argentine treaty.⁴ Save in the case of *Re Lobrasciano*, a New York decision in 1902, the problem of interpretation has received careless treatment. In that case the court reached the conclusion that the right to intervene in the possession and administration necessarily embraced the right to administer. The court said in part:

It would seem that the only intelligent construction would be that the consul had the right to come between the property and the possession by some one else than himself, with the result that possession must necessarily be landed in him. To intervene in the administration is secondary; he first comes into possession, and then he comes between the administration and the person who might have a right thereto under State law. This is giving to the word "intervene" its ordinary definition, and avoiding its local legal significance. Endeavoring to ascertain the spirit and intention of the language "to intervene in the possession, administration and judicial liquidation of the estate of the deceased," we must have regard for the entire context and we may not select a single word for definition. It must not be viewed, as would a New York statute, from our own local standpoint. It must be borne in mind that there can be but one correct construction of a contract; therefore, as we construe, so must the authorities of Italy; consequently, we must view it from the Italian, as well as our own, standpoint, and from both see what was intended to be accomplished by the use of the words quoted.⁵

Nowhere has there been a better commentary on the clause in question. Obviously the process of examining the sense in which a single word, such as "intervene," is employed in a standard dictionary is wholly

² See in *Re Lobrasciano's Estate*, 77 N. Y. Supp. 1040, 1044.

³ U. S. Constitution, art. VI, sec. 2.

⁴ See *In re Wyman*, 191 Mass. 276; *In re Fattosini*, 67 N. Y. Supp. 1119; *In re Lobrasciano*, 77 N. Y. Supp. 1040; *In re Silvetti*, 122 N. Y. Supp. 400; *In re Arduino's Estate*, 7 Ohio Law Rep., No. 51, p. 389.

⁵ 77 N. Y. Supp. 1040, 1047.

inadequate as a means of ascertaining the sense in which the parties to a treaty may have used an entire clause. It is reasonable to infer that the contracting parties sought to enable a responsible official of the nationality of a deceased citizen to place himself in control of the assets of the estate. The consul was known to be the natural and proper person to care for such interests. When the Argentine treaty was concluded the practice of civilized nations was to permit consular officers to exercise such rights.⁶ This practice was reflected in the views of text-writers. Thus the provisions of the treaty expressed, although in loose form, an acknowledgment or grant of a right which consuls were then supposed to possess.

In the *Ghio* case the Supreme Court of California is of opinion that the provision that the consular right shall be exercised "conformably with the laws of the country" necessarily precludes consular preference over a local administrator, given by local law a right of appointment; that, in a word, the treaty contemplates that a consular officer shall not have the right to administer when the local laws of a particular commonwealth make contrary provision. If this contention be sound, it follows that the right to administer depends upon the consent of the several States, and that it lies within the power of any one of them to render nugatory what is sought to be given. It is not believed that this inference is to be derived from the language of the treaty. If it had been the intention of the high contracting parties to limit to such degree the right conferred, it is reasonable to assume that the right reserved to the States would have been specified in the agreement.⁷

It is believed that the reference to the local laws in the Argentine treaty refers to procedure rather than to a limitation of the substantial right given; and that it was intended to signify that the consular officer who sought to avail himself of the power given him, should do so in

⁶ See, for example, communication of Mr. Marcy, Secretary of State, August 21, 1855, to the American Consul General at London; Moore International Law Digest, V, 118.

⁷ Thus we find, for example, that the Federal Government in the treaty with France of February 23, 1853, was reluctant to agree to permit Frenchmen to acquire and hold real property in the several States of the United States without the consent of such States. Thus the treaty made specific provision in Article VII, that "as to the States of the Union by whose existing laws aliens are not permitted to hold real estate, the President engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right." (See U. S. Treaties in Force, 270.)

accordance with local regulations, and submit himself to such tribunals as might in the respective countries care for the administration of the estates of deceased persons.

Until the *Ghio* judgment was rendered no American decision recorded in any report that has been seen, denied a consul the right to administer under the treaty in question.⁸ In taking a position flatly opposed to that of the courts in Massachusetts, New York, Ohio and Michigan (according to reports of *nisi prius* cases), the California tribunal has employed a method of interpretation which, irrespective of the conclusion reached, should be tested by appeal to the Supreme Court of the United States.

THE INTERNATIONAL COMMITTEE ON THE LEGAL PROBLEMS OF AVIATION

An international committee on the legal problems of aviation has recently been constituted under the auspices of various associations interested in the progress of aërial navigation in France with the coöperation of the Aéro Club of France and the International Aërial League. This body which is to be known as the *Comité Juridique International de l'Aviation*, has a two-fold object: (1) to elaborate in each country the legal doctrines of aërial navigation with a special view toward legislation favorable to its progress; (2) to defend the interests of aviation in all countries before all official bodies.

In France itself, the Committee enjoys a most extensive organization. At the seat of each appellate tribunal, a doctrinal sub-committee composed of magistrates, professors of law, advocates and ministerial officials, has for its mission to elaborate a code of the air; to make a systematic collection of all literary documentary material relating to the legal problems of aërial navigation and to collaborate in the publication of a Review intended to constitute an official organ of the committee. In coöperation with the "doctrinal committee," a "committee of defense" operates as a practical counselor and active defender before legislative.

⁸ The case of *Lanfear v. Ritchie*, 9 La. Annual, 96, cannot be regarded as in point because it did not involve the right of a consular officer to administer under the Argentine treaty. In the case of *Re Logoriat's Estate*, 89 N. Y. Supp. 507, the adverse comments of the court on the consular right under the Argentine treaty were *dicta*. The consul was even in that case granted letters of administration by default of a competent person to oppose him.

administrative and judicial tribunals of all societies and individuals interested in aviation who apply for its assistance. These committees work through an active delegate so as to obtain unity of action. In countries other than France, the organization is not completely effected as yet, although it is intended to place each country under a national delegate and the most important jurisdictions under local delegates.

• The publication of the Review is already under way. It has appeared monthly since January, 1910, and bears the title *Revue juridique internationale de la locomotion aérienne* and is devoted to the purposes of the Committee as already outlined.

The detailed organization which has thus been undertaken in France contemplates a closer bond of union with other countries and the large number of distinguished jurists who are giving their moral as well as active support to the Committee, testifies to the very lively interest devoted, at least in France, to the influence which aerial navigation promises to exert upon all branches of jurisprudence, international as well as local, public as well as private.

At the meeting of the Institute of International Law which took place in Paris during March and April of this year, the topic received considerable attention and led to an exchange of views. M. Paul Fauchille, who, in 1902, presented a draft law suitable for uniform legislation in all countries, presented to the Institute an entirely new *projet* in the way of a draft convention for international acceptance relating only to peace times and containing modifications suggested by the mechanical advance of the art since 1902.

The Institute did not make this *projet* or the subject with which it deals the order of the day for 1910, but, instead, decided to submit the same to the Diplomatic Conference upon Aerial Navigation which it is intended shall meet in Paris some time during this year. This Conference, called by the French Government, will be composed of official diplomatic delegates from as many countries as will accept the invitation and will consider a large number of problems relating to the subject, dealing more particularly with the administrative regulations governing international flights, the identification of the various types of air-craft and rules applicable to pilots. A report has recently been made to the Chamber of Deputies by M. Paul Deschanel upon the subject of this forthcoming conference and the expenses therefor are to be embraced in the budget for the Ministry of Foreign Affairs for the year 1910.

THE NEW ENGLAND ARBITRATION AND PEACE CONGRESS

The New England Arbitration and Peace Congress, held in Hartford and New Britain, Connecticut, May 8, 9, 10, and 11, presented a dignified contribution to the literature of international peace. The Congress was held under the auspices of the American Peace Society and of the Connecticut Peace Society. The headquarters were in the Center Church House, Hartford, kindly loaned by the First Church of Christ in Hartford, a society founded in 1832 by Thomas Hooker, "Father of American Democracy."

Hartford has long been a center of interest in the abolition of war. In 1828 the Hartford County Peace Society was founded, in 1831 the Connecticut Peace Society began, and in 1835 the American Peace Society moved from New York to Hartford, where it took over the *American Advocate of Peace*, a quarterly journal which had been started by the Connecticut Peace Society in 1834. Thus Hartford may be called one of our ancient centers of interest in the cause of international peace. Indeed, one might point out that the Hartford Convention of 1814 was in a sense a peace congress of some little interest to the student of history.

New Britain, a city of nearly fifty thousand, and ten miles from Hartford, felt a peculiar interest in the Congress this year because Elihu Burritt was born in that place just one hundred years ago. New Britain is royally proud of the "Learned Blacksmith's" career, and generously demonstrated its affection by speech, pageant, and reception Tuesday afternoon and evening, May 10th. It was in the afternoon, near Burritt's grave, and in the presence of many thousands that the orator of the day, Dr. James Brown Scott, turned from his main thought long enough practically to announce that there had been essentially accomplished in this centennial year of Burritt's birth what Burritt plead and labored for a half-century ago, namely, an International Court of Arbitral Justice. A dispassionate retrospect must view this announcement, because of his dramatic color and historical importance, as the great single utterance of the Congress.

But there were other utterances at the various meetings, and for a variety of reasons many of them were of importance. John Brown Lennon, descendant of John Brown, and treasurer of the American Federation of Labor for many years, said in a carefully prepared paper:

What has been the lot of the world's toilers through all these ages of contest and war, slavery, serfdom, ignorance, poverty, squalor and spoliation? Mark-

man's "Man with the Hoe" is a true picture of the worker under the reign of war. War weapons from the galley to the modern dreadnaught, from the bow and arrow to the repeating rifle, have all tended to increase the war spirit, rather than to retard it. * * * The economic forces of the world which depend upon peace for their best development are working day and night—silently perhaps—but none the less effectively, against war. And with such agitation as this meeting and other conferences, great progress is being made. * * * While we keep ourselves clean, our honor is safe; and I can see no sense in the claim that matters involving the honor of nations cannot be arbitrated. * * * When industrial conditions are such that man can secure a proper standard of living by reasonable labor, the spirit of covetousness, that underlies war, will die; and wars will be at an end.

Henry Wade Rogers, dean of the Yale Law School, took the gavel as the president of the Congress at the meeting at two o'clock p. m. in the House of Representatives at the Connecticut capitol. Dean Rogers' address was characteristically clear and convincing. He believes that peace congresses are gradually but surely educating the people away from war and toward the settlement of international disputes by reason rather than force. He denies emphatically that war is necessary for the development of a nation's highest qualities, and finds his greatest hope in an international court which shall function as a substitute for war.

Interest in the congress was shown by leading men of various fields. Letters were received from President Taft, Secretary Knox, Secretary Dickinson, Mr. Bryan, and Mr. Gompers. Ambassador Bryce wrote two letters, one upon the general problem of peace and another appropriate to the recent death of England's king. Jackson H. Ralston proved the fallacy in the old argument for vital interest and national honor. Reverend O. P. Gifford submitted a three-plank peace platform as follows: "No strife between brothers, no profit from war, tax paid only to righteousness and peace." President Thomas of Middlebury College contended that religion is the dynamic of a successful world peace movement.

At the session Wednesday afternoon Honorable Simeon E. Baldwin, ex-Chief Justice of the Supreme Court of Connecticut, delivered an address entitled, "International Law as a Factor in the Establishment of Peace." Later in the afternoon of the same day, at the annual public meeting of the American Peace Society, General John W. Foster, ex-Secretary of State, notwithstanding a threatened serious tonsillitis, delivered as the annual address, "War not Inevitable. Illustrations from the History of our Country." Mr. Foster's conclusion was as follows:

The review which I have made has shown that all the foreign wars in which we have engaged were brought on by our own precipitate action, that they were not inevitable, and that they might have been avoided by the exercise of prudence and conciliation. It also shows that it has been possible for us to live in peace with our nearest neighbor, with which we have the most extensive and intimate relations, the most perplexing and troublesome questions. Our history also shows that during our whole life as an independent nation, no country has shown towards us a spirit of aggression or a disposition to invade our territory. If such is the case, is it not time that every true patriot, every lover of his country and of its fair fame in the world, every friend of humanity, should strive to curb the spirit of aggression and military glory among our people and seek to create an earnest sentiment against all war?

We repeat that the New England Arbitration and Peace Congress succeeded in presenting a dignified contribution to the literature of international peace.

MR. ROOSEVELT'S NOBEL ADDRESS ON INTERNATIONAL PEACE

Mr. Roosevelt's appearance at Christiania, Norway, was a notable occasion and the address he delivered on May 5, 1910, as recipient of the Nobel Peace Prize, was a notable address. His views are not in themselves novel: they are the views of his enlightened fellow-countrymen expressed countless times both in public and private by those who believe that the old order of things is changing, that the peace of the future should be based upon justice and righteousness, not upon force and self-interest, and that steps should be taken to provide instrumentalities for the changed conditions and to accelerate their progress. Instances are, however, rare of men in official and commanding position who have the courage to express such views, and their expression by such persons gives them a currency and an influence which they would not otherwise possess. We know that peace is desirable if it be just; that arbitration is an admirable method of settling the right of a controversy and that treaties of arbitration are the means of securing the arbitration of future as well as past controversies; that a permanent international tribunal is, if not absolutely necessary, nevertheless highly desirable, and that reason and its, maybe, self-preservation suggest, indeed require a limit to the increase of land and naval armaments. But we are confirmed in our beliefs and justified in our exertions when a man of Mr. Roosevelt's experience and standing not only proclaims our views, but proposes that they be put into effect and operation by international agreement.

After a few introductory paragraphs, and after stating that he speaks as a practical man, recommending to the nations at large policies which he advocated while President and which he would gladly see his own country adopt, Mr. Roosevelt spoke in full as follows:

The advance can be made along several lines. First of all, there can be treaties of arbitration. There are, of course, states so backward that a civilized community ought not to enter into an arbitration treaty with them, at least until we have gone much further than at present in securing some kind of international police action. But all really civilized communities should have effective arbitration treaties among themselves. I believe that these treaties can cover almost all questions liable to arise between such nations, if they are drawn with the explicit agreement that each contracting party will respect the other's territory and its absolute sovereignty within that territory, and the equally explicit agreement that (aside from the very rare cases where the nation's honor is vitally concerned) all other possible subjects of controversy will be submitted to arbitration. Such a treaty would insure peace unless one party deliberately violated it. Of course, as yet there is no adequate safeguard against such deliberate violation, but the establishment of a sufficient number of these treaties would go a long way towards creating a world opinion which would finally find expression in the provision of methods to forbid or punish any such violation.

Secondly, there is the further development of the Hague Tribunal, of the work of the conferences and courts at The Hague. It has been well said that the first Hague Conference framed a Magna Charta for the nations; it set before us an ideal which has already to some extent been realized, and towards the full realization of which we can all steadily strive. The second Conference made further progress; the third should do yet more. Meanwhile the American Government has more than once tentatively suggested methods for completing the Court of Arbitral Justice, constituted at the second Hague Conference, and for rendering it effective. It is earnestly to be hoped that the various Governments of Europe, working with those of America and of Asia, shall set themselves seriously to the task of devising some method which shall accomplish this result. If I may venture the suggestion, it would be well for the statesmen of the world, in planning for the erection of this world court, to study what has been done in the United States by the Supreme Court. I can not help thinking that the Constitution of the United States, notably in the establishment of the Supreme Court and in the methods adopted for securing peace and good relations among and between the different States, offers certain valuable analogies to what should be striven for in order to secure, through the Hague courts and conferences, a species of world federation for international peace and justice. There are, of course, fundamental differences between what the United States Constitution does and what we should even attempt at this time to secure at The Hague; but the methods adopted in the American Constitution to prevent hostilities between the States, and to secure the supremacy of the Federal Court in certain classes of cases, are well worth the study of those who seek at The Hague to obtain the same results on a world scale.

In the third place, something should be done as soon as possible to check the growth of armaments, especially naval armaments, by international agreement. No one power could or should act by itself; for it is eminently undesirable, from the standpoint of the peace of righteousness, that a power which really does believe in peace should place itself at the mercy of some rival which may at bottom have no such belief and no intention of acting on it. But, granted sincerity of purpose, the great powers of the world should find no insurmountable difficulty in reaching an agreement which would put an end to the present costly and growing extravagance of expenditure on naval armaments. An agreement merely to limit the size of ships would have been very useful a few years ago, and would still be of use; but the agreement should go much further.

Finally, it would be a master stroke if those great powers honestly bent on peace would form a League of Peace, not only to keep the peace among themselves, but to prevent, by force if necessary, its being broken by others. The supreme difficulty in connection with developing the peace work of The Hague arises from the lack of any executive power, of any police power to enforce the decrees of the court. In any community of any size the authority of the courts rests upon actual or potential force; on the existence of a police, or on the knowledge that the able-bodied men of the country are both ready and willing to see that the decrees of judicial and legislative bodies are put into effect. In new and wild communities where there is violence, an honest man must protect himself; and until other means of securing his safety are devised, it is both foolish and wicked to persuade him to surrender his arms while the men who are dangerous to the community retain theirs. He should not renounce the right to protect himself by his own efforts until the community is so organized that it can effectively relieve the individual of the duty of putting down violence. So it is with nations. Each nation must keep well prepared to defend itself until the establishment of some form of international police power, competent and willing to prevent violence as between nations. As things are now, such power to command peace throughout the world could best be assured by some combination between those great nations which sincerely desire peace and have no thought themselves of committing aggressions. The combination might at first be only to secure peace within certain definite limits and certain definite conditions; but the ruler or statesman who should bring about such a combination would have earned his place in history for all time and his title to the gratitude of all mankind.

There is nothing inconsistent with these views in the careful and measured address which Mr. Roosevelt delivered a few days later on May 12, 1910, at the University of Berlin. It is true that he there spoke of the necessity of preparation for war, lest a nation become a prey to the unjust aggression of a powerful and well-equipped neighbor. But war is looked upon as an evil, and as a virtue in itself. "Unjust war is," he says, "to be abhorred; but woe to the nation that does not make ready to hold its own in time of need against all who would harm it; and woe

thrice over to the nation in which the average man loses the fighting edge, loses the power to serve as a soldier if the day of need should arise."

But this same statement is immediately preceded by a tribute to the dreamers and philanthropists: "We must remember also," he says, "that it is only by working along the lines laid down by the philanthropists, by the lovers of mankind, that we can be sure of lifting our civilization to a higher and more perfect plane of well-being than was ever attained by any preceding civilization."

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Arch. dipl.*, Archives diplomatiques, Paris; *B.*, boletín, bulletin, bollettino; *B. A. R.*, Monthly bulletin of the International Bureau of American Republics, Washington; *Doc. dipl.*, France: Documents diplomatiques; *Dr.*, droit, diritto, derecho; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain: Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *Mém. dipl.*, Mémorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *N. R. G.*, Nouveau recueil général de traités, Leipzig; *Q. dipl.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs-G.*, Reichs-Gesetzblatt, Berlin; *Staatsb.*, Staatsblad, Gröningen; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, the Times (London); *Treaty ser.*, Great Britain: Treaty Series.

September, 1909.

- 12 FRANCE—GRANDE COMORE. Convention signed at Tananarivo providing for the abdication of the Sultan, Saïd Ali, and for the annexation of the Grande Comore to France. Text in *Mém. dipl.*, February 13.

October, 1909.

- 2 MEXICO—RUSSIA. A general treaty of friendship, navigation, and commerce was signed at St. Petersburg. *R. dipl.*, May 15.
- 24 FRANCE—RUSSIA. Telegraph convention concluded. *J. O.*, April 7, p. 1917.

December, 1909.

- 4 PARAGUAY adhered to the convention signed July 6, 1906, at Geneva, for the amelioration of the condition of wounded and sick, etc. Effective only after a year from notification and in the absence of objections by powers signatory to the convention of Geneva, of August 22, 1864. *Monit.*, January 20.

January, 1910.

- 11 FRANCE—GREAT BRITAIN. Declaration signed at Paris, abrogating the agreement of November 8, 1899, respecting the exchange of press telegrams. *Treaty ser.*, No. 2, 1910; *Arch. dipl.*, 50:358.

January, 1910.

- 11 FRANCE. Decree rendering applicable from July 1, 1909, to the colonies of Indo-China, Madagascar, New Caledonia, and Senegal, the arrangements adopted by the international telegraph conference of Lisbon, June 11, 1908. *Arch. dipl.*, 50:216; *J. O.*, January 20.
- 13 CUBA. Adhesion to the convention of July 5, 1890, instituting an international union for the publication of customs tariffs. *B. Usuel*, January 13; *Monit.*, January 13.
- 14-27 MONACO—RUSSIA. Declaration of an extradition agreement, signed at Paris: an addition to the list of crimes and offenses enumerated in the convention concluded August 24/ September 5, 1883. No. 29, *Collection of Laws and Ordinances, Russia*.
- 15 FRANCE. Decrees issued relative to the creation and organization of the general government of French Equatorial Africa. *J. O.*, January 16; *Arch. dipl.*, 50:221; *R. du Dr. Public*, 17:195.
- 26 GUATEMALA. Ratification by the President of the convention respecting the limitation of the employment of force for the recovery of contract debts. Approved by the National Legislative Assembly in decree No. 791, April 29, 1909. *Official Ga.*, April 18.
- 29 FRANCE—MEXICO. Decree by President of France rendering the convention of June 3, 1908, signed at Mexico City regarding marriages celebrated before their respective diplomatic and consular officers, applicable to the French colonies. *J. O.*, February 4; *R. du Dr. Public*, 17:193.

February, 1910.

- 1 INTERNATIONAL. An international *giro service* was inaugurated between Germany, Austria-Hungary, and Switzerland. *L'Union Postale*, 35:48.
- 1 CANADA—FRANCE. Ratifications exchanged at Paris of the convention and supplementary convention regulating the commercial relations between Canada and France signed at Paris September 19, 1907, and January 23, 1909, respectively. *Treaty ser.*, No. 4, 1910. French decree issued February 11. *J. O.*, February 13.
- 1-5 SECOND CENTRAL AMERICAN CONFERENCE, postponed from January 1, 1910, was held at San Salvador. The first met January 1, 1909, at Honduras. *B. A. R.*, 30:498; *La Gaceta, San José de Costa Rica*, March 23, (texts of conventions); *Political Science Q.*,

February, 1910.

- 25:361; *Segunda Conferencia Centro-Americana (Actas—Convenciones)*, San Salvador. See *February* 2, 3 and 4.
- 2 INTERNATIONAL. Convention relative to the unification of money (gold standard) signed at San Salvador by the delegates to the Second Central American Conference. See *February* 1-5 for references.
- 2 INTERNATIONAL. Convention providing for the establishment in Costa Rica of a pedagogic institute for Central America, signed at San Salvador by the delegates to the Second Central American Conference. See *February* 1-5 for references.
- 3 INTERNATIONAL. Convention relative to the declaration of the functions of the International Central American Bureau, signed at San Salvador by the delegates to the Second Central American Conference. See *February* 1-5 for references.
- 3 INTERNATIONAL. Convention relative to the unification of weights and measures signed at San Salvador by the delegates to the Second Central American Conference. See *February* 1-5 for references.
- 3 FRANCE. Law passed approving the International Radiotelegraphic Convention and annexes of November 3, 1906. (*q. v.*) *J. O.*, February 3.
- 3 GERMANY—GREAT BRITAIN. Treaty of arbitration extended to July 12, 1914. *Mém. dipl.*, February 6.
- 4 INTERNATIONAL. Convention providing for commercial reciprocity among the Central American States, signed at San Salvador by the delegates of Nicaragua, Honduras, Costa Rica, and Guatemala. The delegate from Salvador accepted the convention as a recommendation only. See *February* 1-5 for references.
- 4 INTERNATIONAL. Convention providing for the unification of the consular service of the Central American Republics, signed at San Salvador, by the delegates to the Second Central American Conference. See *February* 1-5 for references.
- 9 DENMARK—FRANCE. Convention signed at Copenhagen, supplemental to the convention of commerce and navigation, signed in Paris, February 9, 1842.
- 10 CHINA—JAPAN. The Manchurian postal convention was signed at Peking. *North China Herald*, February 18; *Mém. dipl.*, February 13. *Imperial Asiatic, etc. R.*, April.

February, 1910.

- 12 FLIGHT OF THE DALAI LAMA FROM LHASA, TIBET, TO INDIA.
Times, February 24, 25, 26 (Decree of Deposition by China);
Independent, March 3; *La déchéance du dalai-lama*, *Q. dipl.*,
14:382; *Usdzang: The Dalai Lama Imbroglio*, *Fortnightly R.*,
520:669.
- 16 FRANCE—ITALY. Declaration signed at Paris relative to the re-
ciprocal recognition of the gauge of vessels as shown by the papers
of their respective vessels. Decree issued at Paris, March 29.
J. O., April 2.
- 22 FRANCE—LUXEMBURG. Arrangement concluded reducing the tax
on letters exchanged between the two countries. *J. O.*, April 24.
- 28 BRAZIL—UNITED STATES. Ratifications exchanged at Rio de
Janeiro of the naturalization convention signed at Rio de Janeiro,
April 27, 1908; ratification advised by the Senate, December 10,
1908; ratified by the President, December 26, 1908; by Brazil,
December 6, 1909; proclaimed by the President, April 2, 1910.
U. S. Treaty ser., No. 547. Text in SUPPLEMENT, p. 262.

March, 1910.

- 1 GUATEMALA—HONDURAS. The boundary convention of March 1,
1895, due to expire this date, has been extended until March 1,
1912. *B. A. R.*, February.
- 1 PANAMA. Death of President Obaldia. Succeeded by Dr. Carlos
A. Mendoza, born October 31, 1855. *B. A. R.*, April; *R. dipl.*,
April 3 and May 22; *Mém. dipl.*, March 6.
- 1 CANADA—GERMANY. Discriminatory duties abolished. The agree-
ment is provisional and subject to a general convention for the
regulation of the commercial relations between the two countries
to be negotiated later. *Times*, February 17.
- 1 INTERNATIONAL. Ratifications deposited at Paris, by France, Ger-
many, Austria-Hungary, Bulgaria, Spain, Great Britain, Italy
and Monaco of the international convention relative to the circula-
tion of automobiles, signed at Paris, October 11, (*q. v.*). It was
signed also by Belgium, Greece, Montenegro, The Netherlands,
Portugal, Roumania, Russia, and Servia. *J. O.*, April 7. Decree
issued by President of France, March 29. Ratification deposited
by Russia, March 5. *J. O.*, April 25. The convention will be in
force May 1, 1910.

March, 1910.

- 5 FRANCE—MOROCCO. The agreement concluded at Paris, January 20 and taken to Fez, February 2, ratified by Mulai Hafid, and returned, was signed at Paris. *Times*, March 7 and May 16; *Mém. dipl.*, February 13; *L'accord franco-marocain, Q. dipl.* 14: 376, 438.
- 12 BELGIUM—FRANCE. Accord signed at Paris, in connection with the convention concerning reparation of damages resulting from accidents of labor, signed at Paris February 21. In effect three months after signature. *J. O.*, April 12.
- 15 BOLIVIA—GERMANY. Exchange of ratifications at La Paz, of treaty of friendship and commerce, signed at La Paz, July 22, 1908. *Reichs-G.*, Nr. 14, 1910.
- 15 FRANCE—TUNIS. Convention to fix new division of charges in the matter of the guarantee of interest on certain railroads in Tunis, signed at Paris. Approved by President of France, April 11. *J. O.*, April 15.
- 15 AUSTRIA—ROUMANIA. Exchange of ratifications at Bucharest of the convention concerning the reciprocal protection of works of literature, art and photography signed at Bucharest February 18, March 2, 1908. In force March 30, 1910. Austrian decree, March 23. *Le Dr. D'Auteur*, 23:48.
- 17 COSTA RICA—PANAMA. Protocol stating the facts on which Chief Justice Fuller will arbitrate their boundary differences, signed at Washington. *Am. R. of Reviews*, 41:243; *B. A. R.*, April.
- 18 AUSTRIA—RUSSIA. Agreement signed at St. Petersburg restoring normal relations. *Austro-Russian Diplomacy in the Near East. Times*, March 24; *Les negociations austro-russes, R. dipl.*, March 13; *Les conversations austro-russes, Q. dipl.*, 14:329; *Bosnia and Herzegovina, Independent*, March 24; *Dorobantz: Les communi-ques austro-russes, Q. dipl.*, 14:403; *L'accord austro-russe, Arch. dipl.*, 50:425.
- 21 CHILE—PERU. Peruvian Government severs diplomatic relations with Chile because of the expulsion of Peruvian priests from Tacna and Arica. *Am. R. of Reviews*, 41:545; *Independent*, March 31.
- 24 UNITED STATES. President Taft signed proclamations admitting under the terms of the *minimum* tariff, imports to the United States from practically all the world not listed under date of

March, 1910.

- January 18 (*q. v.*), excepting the following: France, and French possessions and Nicaragua, admitted under date of March 28; Colombia, Servia, Roumania, Bulgaria, and Venezuela, March 29; Dominion of Canada, New Zealand, Australia, Newfoundland (including Labrador) and British South Africa, March 30; and all British possessions not previously covered, on March 31. *Am. R. of Reviews*, 41:545.
- 25 LIBERIA. Report of the American Commission transmitted by President Taft to Congress. *Am. R. of Reviews*, 41:540; *Independent*, March 3; *Nation*, 90:392; *Outlook*, May 7; *Times*, March 26.
- 26 BRAZIL—UNITED STATES. Parcels-post convention signed at Rio de Janeiro.
- 28 INSTITUTE OF INTERNATIONAL LAW met at Paris. *Times*, March 29.
- 29 THIRD INTERNATIONAL PHYSIOTHERAPEUTIC CONGRESS met at Paris. The first congress was held at Liege, August 12–15, 1905; the second, at Rome, October 13–16, 1907; the next congress will be at Berlin, in 1912. *Times*, March 30.
- 30 GREAT BRITAIN—MEXICO. Treaty concluded at Mexico City providing that both countries shall have equal rights in navigating the rivers forming the boundary of Yucatan and British Honduras. *Times*, April 1.
- 31 GREAT BRITAIN—VENEZUELA. Latter pays \$1030 for unlawful detention of British trading schooner in 1908. *Am. R. of Reviews*, 41:245.

April, 1910.

- 1 GREAT BRITAIN—UNITED STATES. Ratification by the President of the treaty concerning the boundary waters between the United States and Canada signed at Washington, January 11, 1909. (*q. v.*) Ratified by Great Britain, March 31, 1910; ratifications exchanged at Washington, May 5; proclaimed, May 13. *U. S. Treaty ser.*, No. 548. Text in SUPPLEMENT, p. 239.
- 1 FRANCE. French domestic rates and regulations concerning newspapers, patterns and samples of merchandise, and commercial papers were extended to France (including Algeria), Tunis, and French post-offices in Tripoli and Morocco, on the one hand, and the French colonies and possessions on the other. *L'Union Postale*, 23:80.

April, 1910.

- 5 ARGENTINE—CHILE. The Trans-Andean tunnel formally opened. *Am. R. of Reviews*, 41:545, 580; *R. dipl.*, April 10. See November 27.
- 8 PERSIA—RUSSIA. Agreement by which the Persian Government bound themselves not to permit construction of railways in Persia expired. *Times*, April 7.
- 9 UNITED STATES. President issued a proclamation (No. 1021) respecting the benefits of copyrights to alien authors. *Dr. d'auteur*, 23:59. Text in SUPPLEMENT, p. 261.
- 10 BELGIUM—ROUMANIA. Literary convention signed at Brussels similar to the one signed at Bucharest February 18/ March 2, 1908, between Roumania and Austria. *Dr. d'auteur*, 23:56. See March 15.
- 18-29 INTERNATIONAL CONFERENCE FOR THE SUPPRESSION OF THE WHITE SLAVE TRAFFIC opened at Paris. The first conference met in 1902 and the convention then prepared has since been ratified by fourteen powers. The delegates to the present conference took up the question of the *suppression of the international circulation of obscene publications*. *Times*, April 20, 30.
- 21 FRANCE—GERMANY. President of France promulgates the convention to regulate the telephone service between the two countries, signed at Paris, July 8, 1908. *J. O.*, April 24.
- 21 FRANCE—SPAIN. President of France promulgates the convention to regulate the telephone service between the two countries, signed at Paris, December 31, 1909. *J. O.*, April 24.
- 22-Oct. 1 INTERNATIONAL ART EXPOSITION will be held at Venice. *Am. R. of Reviews*, 41:604.
- 23 BRUSSELS INTERNATIONAL AND UNIVERSAL EXPOSITION opened. It will close in October. *Times*, April 23; *R. dipl.*, May 1.
- 26 INTERNATIONAL. Dedication of the building given to the International Bureau of American Republics by Mr. Andrew Carnegie together with contributions by all the Republics of the western continent and built at Washington on ground given by the United States. *B. A. R.*, May; *A Center of Pan-Americanism*, *Am. R. of Reviews*, 41:574; *A New Pan-American Temple*, *Outlook*, May 7; *A Temple of Friendship*, *Independent*, May 5; *L'inauguration du Capitole panaméricain à Washington*, *Mém. dipl.*, May 1.

April, 1910.

28 EGYPT—GERMANY. The Federal Council adopted the prolongation to 1917 of the treaty of commerce and navigation concluded in 1892 to terminate in 1912. It grants to Germany most-favored-nation treatment except in the cases of Turkey, Persia, and the Soudan. *Mém. dipl.*, May 1.

30—May 3 INTERNATIONAL CONGRESS OF HORTICULTURE was held at Brussels. *R. dipl.*, March 20; *B. del. Min. Rel. Ext.*, Caracas, March, 1910.

30 ADHESIONS to the convention of September 26, 1906 (Berne) interdicting the use of white (yellow) phosphorus in the manufacture of matches: Somaliland, Reunion, Madagascar and dependencies, French West Africa, French Oceania, and New Caledonia, February 12, *J. O.*, February 16; *R. du Dr. Pub.*, 27:202; Tunis, *J. O.*, February 13; North Nigeria, February 24, *J. O.*, March 12; *Treaty ser.*, No. 6, 1910; Leeward Islands, *J. O.*, April 13.

ADHESIONS. The British Protectorate of Zanzibar has adhered to the International Sanitary Convention of Paris, signed December 3, 1903. *Monit.*, January 23; New Zealand, *J. O.*, April 1.

WITHDRAWAL from same convention, Jamaica. *J. O.*, April 1.

ADHESIONS to the International Radiotelegraphic Convention concluded at Berlin, November 3, 1906. Ratification (a) by France, *Monit.*, March 4; (b) by Tunis, *Monit.*, March 25.

ADHESION. Dominican Republic has ratified the Act of Brussels of December 14, 1900, modifying the international convention of March 20, 1883, for the protection of industrial property, which went into effect December 25, 1909. *B. A. R.*, April.

OTIS G. STANTON.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

UNITED STATES ¹

Canada, System of uniform and common international regulations for the protection and preservation of food fishes in the international boundary waters of the United States and, prepared by the International Fisheries Commission. Feb. 2, 1910. 19 p. *Dept. of State*. (H. R. Doc. 638.)

Dept. of State, Statement of the Secretary of State on expenditures in the. 1910. 438 p. *H. of R. Comm. on Expenditures in the Dept. of State*.

Immigration, Annual report of the Commissioner-General of, 1909. 244 p., 2 pl. *Bureau of Immigration and Naturalization*. Paper, 30c.

Immigration of Criminal Aliens. *H. of R. Committee on Immigration and Naturalization*. (H. R. rp. 496, pt. 1, 2.) (H. R. rp. 404, pt. 1, 2.) (H. R. rp. 428.)

Immigration laws and regulations of July 1, 1907. 9th edition. Feb. 15, 1910. 87 p. *Bureau of Immigration and Naturalization*. Paper, 10c.

Immigration and naturalization, Bureau of. Annual report of the chief of division of information, 1909. 24 p.

Immigration and naturalization. Hearings. 1910. 126 p. *H. of R. Committee on Immigration and Naturalization*.

International institute of agriculture at Rome. Statement of David Lubin. 1910. 9 p. *H. of R. Comm. on Foreign Affairs*. • •

Liberia, Letter submitting the report of the commission which visited, to investigate the interests of the United States and its citizens in the Republic of Liberia. Mar. 25, 1910. 37 p. *Dept. of State*. (S. Doc. 457.) Paper, 5c.

Naturalization, Annual report of the chief of division of, 1909. 28 p. *Bureau of Immigration and Naturalization*.

¹ When prices are given, the documents in question may be obtained for the amount noted from the Superintendent of Documents, Government Printing Office, Washington, D. C.

Naturalization. Convention between the United States and Brazil. Signed at Rio de Janeiro, April 27, 1908; proclaimed April 2, 1910. 6 p. *Dept. of State.* (Treaty series 547.)

Naturalization. Convention between the United States and Honduras. Signed at Tegucigalpa, June 23, 1908; proclaimed June 8, 1909. 6 p. *Dept. of State.* (Treaty series 525.)

Naturalization. Convention between the United States and Peru. Signed at Lima, Oct. 15, 1907; proclaimed Sept. 2, 1909. 6 p. *Dept. of State.* (Treaty series 532.)

Naturalization. Convention between the United States and Uruguay. Signed at Montevideo, Aug. 10, 1908; proclaimed June 19, 1909. 6 p. *Dept. of State.* (Treaty series 527.)

Newfoundland fisheries. Agreement effected by exchange of notes between the United States and Great Britain. Signed at London, July 22—September 8, 1909. 7 p. *Dept. of State.* (Treaty series 533.)

Opium commission, Report on the International, and on the opium problem as seen within the United States and its possessions; prepared by Hamilton Wright on behalf of the American delegates to the said commission, held at Shanghai, Feb. 1909. Feb. 21, 1910. 83 p. *Dept. of State.* (S. Doc. 377.) Paper, 5c.

Orinoco corporation, Protocol and exchange of notes between the United States and Venezuela, settlement of the claim of the. Signed at Caracas, Sept. 9, 1909. 11 p. *Dept. of State.* (Treaty series 533½.)

Pacific settlement of international disputes, Convention between the United States and other powers for the. Signed at The Hague, Oct. 18, 1907; proclaimed Feb. 28, 1910. 50 p. *Dept. of State.* (Treaty series 536.)

Patents. Convention between the United States and Germany. Signed at Washington, Feb. 23, 1909; proclaimed Aug. 1, 1909. 5 p. *Dept. of State.* (Treaty series 531.)

Red Cross. Hearings, April 21, 1910. 15 p. *H. of R. Comm. on Foreign Affairs.*

Riparian and water rights of the Federal Government and the various States, Brief and memorandum relating to; presented by Mr. Nelson. Feb. 7, 1910. 14 p. *Senate.* (S. Doc. 351.) Paper, 5c.

Russia, Agreement between the United States and, regulating the position of corporations and other commercial associations. Signed at St. Petersburg, June 12/25, 1904; proclaimed June 15, 1909. 4 p. *Dept. of State.* (Treaty series 526.)

Trade in white women, Further response to a resolution requesting information concerning repression of . Jan. 31, 1910. 34 p. (S. Doc. 214, pt. 2.) *Bureau of Immigration and Naturalization*.

Venezuela, Protocol between the United States and. Settlement of the claim of the United States and Venezuela Company. Signed at Caracas, Aug. 21, 1909. 7 p. *Dept. of State*. (Treaty series 531½.)

CANADA

Agriculture and colonization, Report of the select standing committee on. 1909-10. Ottawa, vii, 131 p. *House of Commons*. (App. No. 1 — 1910.)

GREAT BRITAIN ²

Canada and France, Convention and supplementary convention regulating the commercial relations between. Signed at Paris, Sept. 19, 1907 — Jan. 23, 1909. *Foreign Office*. (Cd. 5021.) 2½d.

Ethiopia, Exchange of notes between the United Kingdom and, with regard to import duties in Ethiopia. 13 April/12 May, 1909. *Foreign Office*. (Cd. 5020.) ½d.

Medicine, International congress of, 1909. Report of the principal delegate of H. M. Government to the Congress held at Budapest. *Foreign Office*. (Cd. 5047.) ½d.

Press telegrams, Declaration between the United Kingdom and France, abrogating the agreement of 8th Nov., 1899, respecting the exchange of. Signed at Paris, 11th Jan. 1910. *Foreign Office*. (Cd. 4970.) ½d.

Public health, Accession of Bulgaria to the international agreement of 9th Dec. 1907, respecting the creation of an International office of. 29th Nov. 1909. *Foreign Office*. (Cd. 4969.) ½d.

Sugar commission, Report of the British delegate to the International, July, 1909. *Foreign Office*. (Cd. 5022.) 1d.

——— March, 1910. *Foreign Office*. (Cd. 5025.) 1d.

DOMINICAN REPUBLIC

Mensaje que el ciudadano Presidente de la republica presenta al Congreso nacional en su 2a legislatura ordinaria. Santo Domingo, 1910. 20 p.

² Official publications of Great Britain, India and many of the British colonies may be purchased of P. S. King & Son, Orchard House, 2 and 4 Great Smith Street, Westminster, London, England.

ECUADOR

Ecuador-Peru. Documentos relativos al litigo de fronteras de ambos países sometido ae fallo arbitral de S. M. Alfonso XIII Rey de España. Quito, 1910. 100 p., 1l. *Ministerio de relaciones exteriores.*

Perú. Coleccion de documentos sobre limites Ecuatoriano — Peruanos por el R. P. Fr. Enrique Vacas Galindo. Quito, 1902-3. 3 vols. *Ministerio de relaciones exteriores.*

Peru, Cuestion de limites con el. Quito, 1910. iv, 100 p., 1 l. *Ministerio de relaciones exteriores.*

Perú. Exposición ante S. M. C. Don Alfonso XIII en la demanda de la república del Ecuador contra la del Perú sobre límites territoriales por Honorato Vázquez. Madrid, 1906. viii, 525 p., 1 l., map. *Ministerio de relaciones exteriores.*

Perú, Litigio de limites entre el Ecuador y el. El epilogo Peruano. Memorándum por Honorato Vázquez. Madrid, 1907. vi., 193 p. *Ministerio de relaciones exteriores.*

FRANCE

Deuxième conférence de la paix, Projets de loi portant approbation de douze conventions signées à la Haye, le 18 octobre 1907, à l'issue de la. Paris, 1909. *Chambre des députés.* (nos. 2861à 2872.)

ITALY

Emigrazione colonie. Raccolta di rapporti dei RR. agenti diplomatici e consolari. vol. 3, America, pte 3. Roma, 1909. 475 p. *Ministero degli affari esteri.* Price, 2 lire. Libreria Bosca, Rome.

SALVADOR

Mensaje del Señor Presidente constitucional de la Republica de El Salvador, General Fernando Figueroa, a la honorable Asamblea nacional de 1910. 20 p.

VENEZUELA

El Libro amarills de los Estados Unidos de Venezuela presentado al Congreso nacional en sus sesiones de 1910 por el Ministro de relaciones exteriores. Caracas. xxxix, 628 p. *Ministerio de relaciones exteriores.*

Mensaje que el General Juan Vincente Gomez Presidente provisional de la republica presenta al Congreso nacional en 1910. Caracas. 53 p.

BUREAU INTERNATIONAL PERMANENT DE LA PAIX

Sociétés de la paix, Procès-verbal de l'Assemblée générale des délégués des. Bruxelles 1909. 48 p.

PHILIP DE WITT PHAIR.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF
INTERNATIONAL LAW

IN THE MATTER OF THE ESTATE OF GIUSEPPE GHIO

(District Court of Appeal of California, Third District)

March 16, 1909

HART, J. On the 27th day of April, 1908, Giuseppe Ghio died, intestate, in the county of San Joaquin, this state, leaving an estate consisting of personal property of the value of about \$1,061.85. The deceased, at the time of his death, was a resident of San Joaquin county, but a citizen of Italy. His surviving heirs are a widow and three minor children who were, at the time of his death and when the proceeding here involved was heard in the court below, residents of Italy.

Both the public administrator of San Joaquin county and Salvatore L. Rocca, the consul-general of the kingdom of Italy, in and for the states of California, Oregon, Washington, Nevada and the territory of Alaska, petitioned for letters of administration of the estate of said deceased.

The court, upon the hearing of the matter of the petitions of the contesting petitioners, made an order granting letters of administration to George F. Thompson, the said public administrator, and, necessarily, refusing to grant letters to said Salvatore L. Rocca, consul-general, etc.

This appeal is prosecuted from said order.

The ultimate question submitted here for determination is one of more than ordinary magnitude. It involves the important proposition of whether foreign consular officers stationed and representing their governments in the United States are entitled, under and by virtue of the rights conferred upon them by the provisions and stipulations of the treaties subsisting between this and the governments they so represent, to supersede the public administrators in the matter of the administration of the estates of aliens (citizens of the countries they represent) denizenized in this country, dying here intestate and leaving estates within the jurisdiction of our local courts.

It is not claimed that there is any provision contained in the treaty between this government and the kingdom of Italy which, in terms, authorizes the exercise by the consular officers representing the latter government in the United States of the power and right contended for here by the appellant. It is, however, the contention that under the "most favored nation clause" of said treaty the consuls-general of Italy, stationed here, are, by virtue of the provisions of article 9 of the treaty between this government and that of the Argentine Republic, entitled to exercise the power and right claimed by the appellant in preference to the public administrator.

The Italian treaty with this government provides that consuls-general of Italy are entitled to "all the rights, prerogatives, immunities and privileges which are now or may hereafter be granted to the officers of the same grade of the most favored nation."

Article 9 of the Argentine treaty reads as follows:

If any citizen of either of the two contracting parties shall die without will or testament in any of the territories of the other, the consul-general or consul of the nation to which the deceased belonged, or the representative of such consul-general or consul in his absence, shall have the right to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs. *U. S. Treaties, 1904, p. 24; 10 Stats. at Large.*

Whether the position of appellant is tenable or otherwise, rests and hinges entirely upon the meaning of the word "intervene," as used in the foregoing article of the Argentine treaty, and, therefore, upon the correct interpretation of said word, as so employed his contention must either be sustained or rejected.

In support of his contention, appellant cites the following authorities: *In re Fattosini*, 33 Miss. Rep. 18, 67 N. Y. Supp. 1119; *In re Lobrasciano*, 38 Misc. Rep. 415, 77 N. Y. Supp. 1040; *In re Wyman*, 191 Mass. 276, 77 N. E. 379, 114 Am. St. Rep. 601; Devlin on the Treaty Power, section 202.

The construction given by the foregoing authorities of the language of the provision of the Argentine treaty upon which appellant relies to sustain his position is that the Italian consul, under the "most favored nation clause" of the Italian treaty is entitled to the possession, *for the purposes of administration*, of the property of an Italian subject dying intestate and leaving estate within his consular jurisdiction.

The cases of *In re Logiorato*, 34 Misc. 31, 69 N. Y. Supp. 507, and

Lanfear v. Ritchie, 9 La. Ann. 96, hold to opposite views and maintain that the full extent of the right and power prescribed to the Italian consul is to "intervene" in such cases as the one at bar in the sense in which the word is used in our local statute law, and that such is the true interpretation of the word "intervene," as used in the Argentine treaty. In other words, it is held in the last mentioned cases that to intervene is to "come between," and "the right to intervene in a judicial proceeding is a right to be heard *with others who may assert demands or defenses*."¹ This is, obviously, the meaning of intervention or of the right to intervene as prescribed in our local code. *Sec. 387, Code Civ. Proc.* The effect of the construction thus given the provision of the Argentine treaty, that the consul-general "shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, *conformably with the laws of the country*," etc., is that said language means nothing more than that such intervention or such right to intervene shall be in accordance with the procedure or rules laid down by our local laws concerning the right to intervene in any case or under any of the circumstances indicated therein. In other words, assuming that, by virtue of the terms of the "most favored nation" clause contained in the Italian treaty, the Italian consul, as to the estate or property of a subject of the Kingdom of Italy, dying intestate in this country, is brought within the rights conferred by article 9 of the Argentine treaty, he is thus limited to the exercise of the right or power only of making himself a party to the proceedings in administration as an *intervenor*, but must do so according to the mode prescribed for intervention by our code, for the prosecution or defense and protection of the rights of the creditors and of the rightful heirs of the deceased or the legal successors to his estate, and *not as an administrator of the estate* in preference to the officer created by our local laws and invested with the power and right and duty to administer the estates of persons dying intestate, leaving estate situated here, but having no lawful heirs within the jurisdiction of the state.

Mr. Devlin, in his very excellent volume on the treaty power, seems to approve the construction of the language of article 9 of the Argentine treaty as expounded by the New York Supreme Court in the case of *In re Lobrasciano*, *supra*, for without comment, he repeats the language as used in that case that "the power conferred upon the consul by the words

¹ Italics are the court's.

above quoted (the right to intervene) is not limited by the succeeding words, 'conformably with the laws of the country for the benefit of the creditors and legal heirs.' These words relate merely to the procedure of administration," proceeds Mr. Devlin, "and not to the right to administer."

In the case of *In re Wyman*, *supra*, the Supreme Court of Massachusetts, holding with the contention of appellant here upon the construction of article 9 of the Argentine treaty, and applying such construction to the rights of the Russian vice-consul under the "most favored nation" clause of the Russian treaty, brushes aside the ruling in the Louisiana case of *Lanfear v. Ritchie*, *supra*, by declaring that the decision was rendered and filed "at a time when we might expect the doctrine of state rights to be strongly insisted upon."

It is an established and incontrovertible principle that a treaty negotiated by the government of the United States with a foreign power becomes, upon the adoption of such treaty, a part of the law of every state of the American union, and that where the provisions and stipulations of the treaty are at cross-purposes with the statute of any state the latter must succumb to the former. This principle is essentially an indispensable attribute of the treaty-making power vested alone in the general government, and is expressly declared in the second subdivision of article 6 of the Federal Constitution in the following language:

* * * All treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution and laws of any state to the contrary notwithstanding.

The courts, with few exceptions, in the construction of the scope and effect of the treaty-making power delegated to and therefore exclusively vested in the federal government, have gone to the extreme limits, and recognize nothing within the rights reserved by the states to themselves which must not give way to the force of treaty stipulations. The federal courts have uniformly held this power to extend even to the abrogation, *pro tanto*, of all and every character of state legislation involving subjects of exclusive internal cognizance, where the stipulations of treaties and the provisions of local statutes conflict. As stated, this proposition proceeds from the fundamental principle of our system of government "that the constitution, laws, and treaties of the United States are as much a part of the law of every state as its own local laws and constitution." *Hauenstein v. Lynham*, 100 U. S. 490; *Foster & Elam v. Neilson*, 2 Pet. 253;

The Cherokee Tobacco, 11 Wall. 816; Mr. Pinckney's Speech, 3 *Elliott's Constitutional Debates*, 321. And the same principle is enunciated and sustained by some of the state courts, as in the New York and Massachusetts cases cited and relied upon by appellant and to which we have hitherto referred. See also *The People, etc., v. Gerke & Clark*, 5 Cal. 381.

There is not, and there could never be, since the establishment of the general government by the adoption of the Federal Constitution, any doubt that the treaty-making power of the federal government must, from the very necessities of our complex governmental system, be sufficiently broad to cover and include all of the usual subjects of treaties between different nations. Yet, it is not to be wondered that questions involving the extent to which the power could be exercised presented for judicial solution, when the nation was still young, many perplexing and troublesome problems, and that, as an Act of Congress attempting to deal with subjects clearly within the reserved rights of the states in contravention of such rights would be void as being in excess of the power of the national government, the early judges were to no little extent startled at the proposition that said government could accomplish through treaty stipulations what it was powerless to do by congressional legislation. Under the decided cases in which this power has been defined, we are unable to find the line beyond which the government may not extend its exercise.

In the case of *In re Logiorato, supra*, in which, as we have seen, the contention of appellant as to the construction of the language upon which he relies in the Argentine treaty is controverted and discarded, the learned surrogate concedes "that a solemn treaty of the United States with Italy is of binding force, and that it must control all courts, even to the extent of ousting them of jurisdiction or of *changing the rules of their procedure*."² And, thus we are led to inquire: May the federal government through a treaty compact, change the nature of the preliminary proceedings, the mode of trial and the rules of evidence established by the local legislatures in criminal cases in which the laws of the commonwealth are charged to have been violated by citizens of another country who are residents of this? If so, why does not the power extend to the changing of the mode and character of the punishment to be imposed in all cases of infraction of the local criminal laws by foreigners denized here? Is it legitimately within the treaty-making power, as

² Italics are the court's.

applying to aliens residing in this country, to change our procedure and the character of our system of pleadings in civil cases in law and in equity? We shall not undertake to answer these questions. Nor are we to be understood as declaring that, under the treaty-making power granted by the states to the central government, it would not constitute the exercise of competent authority to stipulate or provide for the trial in our *state courts* (we are not now speaking of the practice in consular courts, which are not state or local tribunals, and in which the practice and procedure must, necessarily, be prescribed and regulated by congressional legislation or perhaps by treaty negotiations, or by both) of alien residents by any mode or procedure upon which the government and another power might agree, however radically different such mode of procedure might be from that authorized by the system established by our local legislatures. We neither affirm nor deny the proposition, for, as we have said, we are unwilling to venture an opinion, based upon the decisions we have examined, as to the limitations, if, indeed, there be any, upon this power, except that it cannot be so used as to change the character of the government or to be inconsistent with the nature and structure thereof or the objects for which it was formed. The discovery of the exact and precise limitations upon the exercise of this power by our national government, keeping in view the rights which the states have reserved to themselves or have never given away, is a task which may well be commended to the genius and industry of some curious publicist.

But we think that it can be safely laid down as an incontrovertible proposition that, where a foreign power, under the stipulations of a treaty with this government, claims rights which do not intrinsically or in themselves constitute the "usual subjects" of treaties, such rights must be granted in language so clear and unmistakable that no serious question can arise as to the intention of the high contracting parties in relation thereto, and that in no case should the enjoyment of such rights be vouchsafed upon a strained or far-fetched construction.

It may happen, and perhaps in the history of our foreign relations it has happened, that, in some particular instances, in order to promote and maintain the friendly commercial and political comity so essential to the peace, prosperity and happiness of all civilized countries, requests are made or concessions asked and granted by treaty stipulation (in consideration of the concession of similar rights to this government) as to certain rights which, in strictness, do not involve or appertain to subjects which are peculiarly and inherently of international concern — that is to

say, subjects which in themselves are not indispensably necessary to the maintenance of full and complete international amity. Such requests or concessions, if granted, are obviously acceded to for no other reason than that they are requested, or, perhaps, demanded, and not because they relate to the usual subjects of treaties. We can readily understand how, for instance, in the absence of an express provision in the treaty with regard thereto, a foreign power maintaining treaty relations with this government, could insist under the "most favored nation" clause upon privileges as to our public educational advantages equally with the other governments in conventional amity with this, for the very obvious reason that the subject of education is one of universal interest and concern to all civilized governments. Such a subject naturally comes within the category of the "usual subjects" of treaties. So with all those subjects with reference to which Congress possesses the sole power of legislation, as, for instance, the tariff, interstate commerce with its various ramifications, and like questions.

This leads us to the consideration of the specific question submitted here for decision.

As we have already explained, the Italian consul claims the right to administer upon the estate involved in this controversy by virtue of the "most favored nation" stipulation of the Italian treaty by reference to the effect of said stipulation upon the provisions of article 9 of the Argentine treaty.

As before stated, the determination of the question is dependent upon the construction which may be properly put upon the language of the Argentine treaty by which it is provided that the consul of a foreign country is entitled to "the right to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs."

We may as well say, *in limine*, that we do not agree with the appellant's construction of the language of article 9 of the Argentine treaty. The New York and Massachusetts cases which are cited in support of his construction are entitled to great weight in the consideration of the question, as are likewise the views of Mr. Devlin, who has furnished the profession with a learned and valuable treatise on the treaty-making power; but we are not satisfied with the conclusion reached by those writers and are of the opinion that it can not be sustained upon principle or sound reason.

In the first place, we see nothing in the right to administer upon the estate of a deceased alien, dying intestate and leaving property in this country, which justifies the conclusion that such right constitutes one of the "usual subjects" of international treaties. The subject is one, on the contrary, which in itself, it seems to us, can not and could not affect international relations or become an essential feature of the most perfect commercial and political relations between this and other governments. The object of the administration of estates of deceased persons in this country is, first, to protect the creditors thereof, and secondly, to execute, as to the legal heirs, the law of descents. The rights of creditors are paramount to those of the heirs, but it is the duty of the courts and other officers charged with the responsibility of administering such estates to watch and protect the interests of both with equal vigilance and good faith. This being done, the object of administration is fully and effectually accomplished. Administration of the estates of deceased persons, like that of the estates of minors and incompetents, is a subject, as before suggested, essentially of local concern and possesses none of the characteristics of international importance. And this is equally true where the deceased is an alien resident and his legal heirs citizens and residents of a foreign country. The duty of administering the estate faithfully in the latter case is as binding upon the local officers charged with its performance as if the deceased and his heirs were citizens of this country. The legal heirs of the deceased in the case at bar, although citizens and residents of Italy, are undoubtedly entitled to the residue of the estate of said deceased after the payment of creditors and the expenses of administration. The right, flowing from treaty stipulations, has often been so adjudicated and sustained by our courts, and it involves a proposition which constitutes an appropriate subject of the treaty-making power. The full extent of the interest, therefore of a foreign government in the estate of a citizen of the country over which that government prevails dying intestate here is to see that the alien heirs of the latter or those entitled to succeed to his estate receive in full all that they are entitled to. In other words, such government is interested to the extent only that it may insist that the rights of its own subjects in this country shall be fully conserved and protected. This being so, is it to be supposed, in the absence of an express provision in the treaty to that effect, that this government intended, at the time of the execution of the treaty between it and the Kingdom of Italy, that, under the "most favored nation" clause, the consular officers of the latter stationed here should be au-

thorized to oust a duly created local officer, specifically clothed with the power and duty of administering upon such estates as the one involved here, of his right to exercise the duties of his public office? We can not be persuaded that such was the intention. There is no *reason* of which we can conceive why such have been or was the intention. There is every reason why the intention was not to thus trespass upon the rights of the states and thereby set at naught a local statute specifically enumerating those entitled to administer upon the estates of persons dying intestate and leaving property within the jurisdiction of our local courts.

Foreign consular officers stationed in this country should, undoubtedly, as they always are, be invested with plenary power to protect not only the general rights of the governments to which they belong, but also the individual personal and property rights of citizens of their countries who are denizens of this. And where, as in the case at bar, such officers are given the right by treaty to intervene in the administration of the estates of citizens of their own country dying intestate here — that is, given the right officially and as parties to the proceeding for that purpose to exercise such surveillance over such estates as to enable them to fully protect the interests of the estates and all interested therein — they are thus given a power as plenipotentiary in extent as they are entitled to exercise, and the power so given and limited is not inconsistent with the rights of the states. In California (and we presume the same may be done in most if not all of the states) the probate court has the power to appoint and authorize an attorney to represent and protect the interests of absent heirs to all estates, and to the extent of his authority such attorney may in a sense *intervene* in the administration of those estates. While the right to appoint an attorney for that purpose is not expressly authorized by statute, but is a part of the inherent power of the probate court, it would not for a moment be contended, if the law provided that an attorney should be so appointed and “intervene” in behalf of absent heirs, he would thus be clothed with authority to administer upon such estate in preference to those enumerated in section 1363 of the Code of Civil Procedure.

We think the clear intention of the Argentine treaty was to confer no greater right upon consular officers in cases like the present one than to see that the public administrator administers the estate so as to fully protect and preserve the interests of the creditors and heirs — that is, to see that the estate shall first discharge its obligations to its creditors and then to require the devolution of the residue upon those who are

citizens and residents of a foreign country who are legally entitled to have the same.

But we are not without very excellent authority that the meaning here given to the word "intervene" and the language following the use of the term, "conformably with the laws of the country," is correct.

In the case of *In re Logiorato's Estate*, *supra*, the learned writer of the opinion thus disposes of the question:

It will be observed that the right assured to the consul-general is to "intervene," and that this intervention is to be "conformably with the laws of the country." To intervene is to "come between" (Webst. Dict.), and the right to intervene in a judicial proceeding is a right to be heard with others who may assert demands or defenses. It is not a right to take possession of the entire *corpus* of a fund which is the subject of the proceeding. A right to intervene "conformably with the laws" of the state of New York is something different from a right to set aside the laws of the state, and take from a person who, by those laws, is the officer intrusted with the administration of the estates of persons domiciled here, and who leave no next of kin within the jurisdiction, the right and duty of administering their assets. * * * The eminent text writers cited in the opinion of the learned surrogate (in the Fattosino case), do not intimate that the courts of civilized states, acting under general laws framed for the protection of foreigners equally with their own citizens must grant administration, contrary to the terms of those laws, to consuls, under any circumstances whatever. Thus in Wools. Int. Law, p. 154, the learned writer, in enumerating the duties of consuls, includes the power "of administering on the personal property left within their consular districts by deceased persons, when no legal representative is at hand, and when law or treaty permits, and thus of representing them, it may be, before the courts of the district." Consuls may accept administration, but no right to override the local law is suggested. See also *Wheat. Int. Law* (3d ed.) 167, 168.

Caleb Cushing, as attorney-general of the United States, in a letter addressed to Mr. Cavalcante d'Albuquerque, envoy of the emperor of Brazil, defined the meaning of the word "intervene" as employed in international law. *8 Opinions of Atty-Genl.* 99. This letter was written in the year 1856, three years subsequently to the conclusion of the treaty between the Argentine republic and the United States, and therein the following language is used:

The administration of the estate of a foreign decedent is primarily a question of the local jurisdiction, and his consul can *intervene* only so far as the local law may permit.

In the same letter, at page 99, the learned attorney-general proceeds:

In all these cases, the consul of the decedent's country has no jurisdiction; he may *intervene* by way of advice or in the sense of surveillance, but not otherwise

as consul and of right. Thus, if the decedent, being a foreigner, leaves in the state a minor heir, the consul of his country may *intervene* to see that he have a proper guardian to secure his interests in the succession.

It will thus be noticed that Mr. Cushing's interpretation of the word "intervene" corresponds with that which we hold to be the correct meaning of the term as it is used in the Argentine treaty.

Mr. John Hay, as secretary of state, addressed an official letter, dated February 3, 1900, to Senator E. O. Wolcott, in which he said:

With regard to the second inquiry, pertaining to the last clause of Article III, it may be said that the right of a consular officer to appear personally in behalf of the absent heirs or creditors until they are otherwise represented, does not imply that consular officers have the status of attorneys or are to perform the duties of a public administrator. By the law of nations a consular officer is the provisional conservator of the property within his consular district belonging to his countrymen deceased therein. The United States Consular Regulations direct our consular officers, when the foreign local authorities institute proceedings in relation to the property of deceased Americans who leave no representatives in the foreign country, to intervene by way of observing the proceedings, but it is not understood that this involves any interference with the functions of a public administrator.

But we think it is unnecessary to address further consideration to the question in controversy.

Though in view of the construction we have given the Argentine treaty, it is not necessary to decide the question, we may suggest that it is a matter of serious doubt whether the "most favored nation" clause in a treaty can in any event be invoked to secure advantages and privileges to a government granted by treaty to another country than the one seeking them to avail itself of such privileges, except where such advantages and privileges may be granted freely and without consideration. If, for example, it clearly appeared from the language of the Argentine treaty that the consular officers of the Argentine Republic were accorded the right to administer upon the estates of citizens of that country dying intestate in this, in preference to the public administrator or to any of the other persons mentioned in section 1365 of the Code of Civil Procedure, in consideration of a like privilege or right conceded to any of the diplomatic officers of this government stationed in the Argentine Republic, then we doubt very much whether the "most favored nation" clause in other treaties could avail to give such governments the same right. This, it seems to us, would be particularly true where, as we have held to be the fact here, the privilege or right sought to be exercised

under said clause does not spring from or belong to, intrinsically, any of the usual subjects of treaties. But, as stated, we do not feel that we are called upon to determine this question. An able consideration of the proposition, however, may be found in the opinion of Attorney-General Cushing, rendered in the year 1855, in response to a request therefor from the secretary of state 6, *Opinions of Attorney-General*, p. 148, and also in the cases of *Bartram v. Robertson*, 122 U. S. 116, and *Whitney v. Robertson*, 124 U. S. 190.

Other points are urged and discussed in the briefs, but we do not deem it necessary to consider them.

For the reasons herein expressed, the order appealed from is affirmed.

SAME CASE ON APPEAL

(*Supreme Court of California*)

April 5, 1910

Appeal from the Superior Court of San Joaquin County — Frank H. Smith, Judge.

For Appellant — Ambrose Gherini, Clarey & Loutitt, R. K. Barrows.

For Respondent — Eustace Cullinan, John E. Budd, Cullinan & Hicky, John J. O'Toole, *amici curiæ*.

Salvatore L. Rocca appeals from an order of the superior court granting to George F. Thompson, as public administrator of San Joaquin county, letters of administration upon the estate of Giuseppe Ghio, deceased, and refusing the application of said appellant for such letters.

The appeal was submitted to the District Court of Appeal of the third district and decided in favor of the respondent. A rehearing in the Supreme Court was ordered, because, as treaty rights were involved, it was deemed advisable that the highest state court should consider the matter.

Giuseppe Ghio, at the time of his death, was a resident of San Joaquin county, California, and a citizen of the kingdom of Italy. He left a small estate situated in San Joaquin county. His heirs at law are his wife, Maria, and three minor children. All of them reside in Italy. The appellant is the consul-general of the kingdom of Italy for California, Nevada, Washington and Alaska territory. The deceased died intestate on April 27, 1908, in San Joaquin county.

The sole question for consideration is whether or not where a citizen

of Italy, being a resident of California, dies intestate, leaving property in this state, and his lawful heirs all reside in Italy and are citizens of that country, the consul-general of Italy is entitled to letters of administration upon his estate, in preference to the public administrator of the county of his residence.

The appellant bases his claim to such letters upon the provisions of the treaty of May 8, 1878, between Italy and the United States. The clauses relating to this subject are articles XVI and XVII which are as follows:

Article XVI. In case of the death of a citizen of the United States in Italy, or of an Italian citizen in the United States, who has no known heir, or testamentary executor designated by him, the competent local authorities shall give notice of the fact to the Consul or Consular Agents of the nation to which the deceased belongs, to the end that information may be at once transmitted to the parties interested.

Article XVII. The respective Consuls General, Consuls, Vice Consuls and Consular Agents, as likewise the Consular Chancellors, Secretaries, Clerks or Attaches, shall enjoy in both countries, all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade of the most favored nation. (20 U. S. Stats. at Large, p. 752.)

Under article XVII, the appellant, as consul-general of Italy, claims the rights which are given to consuls-general of the Argentine Republic by the treaty between that country and the United States, concluded July 27, 1853. (10 U. S. Stats. at Large, p. 1001.) The last clause of article IX of that treaty is as follows:

If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the consul-general, or consul of the nation to which the deceased belonged, or the representative of such consul-general or consul, shall have the right to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs. (P. 1009.)

Article VI of the Constitution of the United States declares that

This constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

And section 10, of Article I, further provides that

No state shall enter into any Treaty, Alliance, or Confederation.

We will assume that the treaty-making power of the federal government is so far superior to the law-making power of Congress that it would authorize the federal government to control by treaty the power of the states to confer and limit the right of administration of estates and the power of the state courts to appoint administrators, so far as the estates of resident citizens of foreign countries are concerned. (See, on this subject, note to *Yeaker v. Yeaker*, 81 Am. Dec. 536.) If this is the case, the treaty with the Argentine Republic, if construed in accordance with appellant's contention, supersedes, in part, the provisions of our Code of Civil Procedure of California, giving the right of administration of the estates of persons dying intestate to the public administrator, in the absence of resident legal heirs, and gives to the consular agents of that country a paramount right to letters upon the estates of citizens of that country residing here, who die intestate leaving real or personal property in this state and no resident heirs. The favored nation clause of the Italian treaty would give the like right to the appellant, as consul-general of Italy, in the present case.

Similar favored nation clauses are found in the treaties with Austria-Hungary (treaty of 1870, art. 15, 17 U. S. Stats. 331); Denmark (treaty of 1826, art. 8, 8 U. S. Stats. 342); Japan (treaty of 1894, art. 15, 29 U. S. Stats. 852); Kongo (treaty of 1891, art. 5, 27 U. S. Stats. 929); Korea (treaty of 1882, art. 2, 7 Fed. Stats. Anno. 680); Russia (treaty of 1832, art. 8, 8 U. S. Stats. 448); Spain (treaty of 1902, art. 28, 33 U. S. Stats. 2120); Switzerland (treaty of 1850, art. 7, 7 Fed. Stats. Anno. 842); Tonga (treaty of 1886, art. 11, 25 U. S. Stats. 1442); and Zanzibar (treaty of 1886, art. 2, 25 U. S. Stats. 1439).

Foreign consuls and consular agents are given the same "privileges" as those of the most favored nation by the treaties with Belgium (treaty of 1880, art. 2, 21 U. S. Stats. 777); Costa Rica (treaty of 1851, art. 10, 10 U. S. Stats. 922); France (treaty of 1853, art. 12, 10 U. S. Stats. 999); Germany (treaty of 1871, art. 3, 17 U. S. Stats. 922); Greece (treaty of 1902, art. 2, 33 U. S. Stats. 2123); Honduras (treaty of 1864, art. 10, 15 U. S. Stats. 705); Netherlands (treaty of 1878, art. 3, 21 U. S. Stats. 663); Paraguay (treaty of 1859, art. 12, 12 U. S. Stats. 1097); Persia (treaty of 1856, art. 7, 11 U. S. Stats. 710); Roumania (treaty of 1881, art. 2, 7 Fed. Stats. Anno. 773); and Servia (treaty of 1881, art. 2, 22 U. S. Stats. 968). The treaty of 1903 with China gives Chinese consuls here the same "attributes, privileges and immunities" as those of the most favored nation. (Art. 2, 7 Fed. Stats. Anno. 487.)

The consuls from the countries thus given the same "rights," "prerogatives" or "powers," being those embraced in the list first given, could doubtless claim the same rights as those of Italy, with respect to estates of citizens of their respective countries dying here. Perhaps those included in the second list would claim the same right as a "privilege" within the intent of the respective treaties. The treaty of 1887, with Peru (25 U. S. Stats. 146), which terminated in 1899 by notification from Peru, provided that the consuls of each country, in the absence of heirs or representatives, should, *ex officio*, be the executors or administrators of the citizens of their country who died within their consular jurisdiction. The question presented would directly affect the right of administration upon the estates of all citizens of all the above named countries residing in this state, of whom there is doubtless a large number.

It is also of grave importance because its solution in favor of the appellant necessarily ascribes to the federal government the intent, by means of its treaty-making power, to materially abridge the autonomy of the several states and to interfere with and direct the state tribunals in proceedings affecting private property within their jurisdictions. It is obvious that such intent is not to be lightly imputed to the federal government, and that it can not be allowed to exist except where the language used in a treaty plainly expresses it, or necessarily implies it.

So far as we are aware, the exact point has not been considered in any of the states except Massachusetts and New York. In New York it has arisen only in the surrogate courts of two of the counties, New York county and Westchester county. The surrogate court of the latter county held that the consul-general of Italy was entitled to letters of administration upon the estate of a citizen of Italy who died leaving property in that county, in preference to the county treasurer, who, by the state law, was entitled as public administrator, in the absence of heirs and creditors. (*In re Fattosini*, 67 N. Y. Supp. 1119.) The same court, in a similar case, apparently decided that the Italian consul was entitled, by virtue of his office, to maintain a proceeding in the surrogate court, before any grant of letters of administration, to obtain possession of the effects of the deceased, in order that the consul might administer the same under the direction and control of the court. It does not appear that letters had been granted to the consul. (*In re Lobrasciano's Estate*, 77 N. Y. Supp. 1040.) The surrogate court of New York county held, in a similar case, that, where the public administrator refused to act

and the Italian consul was legally competent under the state law, he would be entitled to letters, under the statutory provision that when in such case the public administrator refused to act, any person legally competent might be appointed. But his right in preference to the public administrator was denied. (*In re Logiorato's Estate*, 69 N. Y. Supp. 507.) The Massachusetts supreme court decided that, under the most favored nation clause of the treaty with Russia and by referring to the treaty with the Argentine Republic, the Russian vice-consul had a right to administer paramount to that of the public administrator, in the case of a citizen of Russia who died in Massachusetts leaving personal property there, his legal heirs being in Russia. (*McEvoy v. Wyman*, 191 Mass. 276.) In a Louisiana case, *Lanfear v. Ritchie*, 9 La. Ann. 96, the Swedish consul applied for an order that he supersede the duly appointed public administrator in the possession of the estate of a deceased citizen of Sweden, whose heirs were Swedish subjects residing in Sweden. The contention was that this was guaranteed by the treaty with Sweden. The treaty then in force did not contain any favored nation clause, nor purport to give to consuls in either country the right to administer the estates of its deceased citizens. The court denied his application on that ground, and also on the ground that a treaty could not control the state courts. In *Aspinwall v. Queen's Proctor*, 2 Curteis, 241, the English court held that the United States consul, as such, had no right under the Act of Congress of 1792, to administer upon the estate of an American traveler who died while in England leaving property there. The court said that "the Crown is the party to see that the property of any person dying in its dominions goes into proper hands" and that the law of the United States could not be allowed to control, even if it purported to do so.

We do not agree with the supreme court of Massachusetts and the surrogate of Westchester county, New York, in regard to the meaning and effect of the Argentine treaty. They held that the right given thereby "to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country," included the right to be appointed administrator of the estate in place of the person who might be designated by the laws of the particular state to be such administrator and who had either been previously duly appointed by the local state court, or was applying for such appointment. It appears clear to us from this language that whatever right was given, it was intended to be a right which should conform to

the laws of the country, and that, in view of the well-known complex form of our government, the phrase "laws of the country," so far as the United States is concerned, means the local laws of administration and procedure of the respective states. If the right asserted is necessarily contrary to those laws, it cannot be said to conform to them. Our law declares that in the absence of next of kin entitled to inherit, the public administrator shall take charge of and administer the estate for the benefit of the creditors and heirs. The right claimed under the treaty is that, in such a case, the consul of the country of which the deceased was a citizen shall take charge and administer; a right directly in conflict with our law. The contention of the appellant is that the only effect of the phrase "conformably with the laws of the country" is that the consul, when appointed, must administer the estate in compliance with the local law of administration. The more obvious interpretation is that the phrase qualifies the right and the method of intervention, as well as the procedure after intervention takes place, that is, that if the consul intervenes, he must do so in the manner, to the extent, and for the purposes prescribed and allowed by the laws of the local jurisdiction in which the property is situated. This is the grammatical effect of the qualifying clause.

Whether the matter in hand is the possession, the administration, or the judicial liquidation of the estate, the treaty secures to the consul only the right to "intervene" therein. The word "intervene" is here used with reference to a proceeding in a judicial tribunal. In that connection the word has a settled meaning. The dictionaries declare that when applied to matters of law it means: "To interpose in a lawsuit so as to become a party to it." (Cent. Dic.; Stand. Dic.) Bouvier defines "intervention" at common law thus: "The admission, by leave of court, of a person not an original party to pending legal proceedings, by which such person becomes a party thereto for the protection of some right or interest alleged by him to be affected by such proceedings." And in the civil law as "The act by which a third party becomes a party in a suit pending between other persons," citing Pothier *Proces Civiles*, lere part, ch. 2, S. 6, 3. (1 Bouv. Dic. Rawles ed. 1114.) A similar definition is given in our Code of Civil Procedure. (Sec. 387.)

Appellants say that the word should be construed according to its literal meaning, "to come between," and that "to come between," in the possession and administration of an estate, means to have a preferred right to act as administrator, if it refers to a time before the appoint-

ment is made, or to supersede any other appointee, if used in reference to any subsequent time. This claim is based on the assertion that an intervention was unknown in the civil law, from which it is supposed the Argentine Republic takes its system of legal procedure, and also upon the principle that in construing treaties words are to be given their popular rather than their legal signification.

The constitution of the Argentine Republic was adopted on May 25, 1853. It was avowedly modeled upon the Constitution of the United States, which it closely follows, both in general plan and in specific provisions. Its government is federal in form, with "provinces" which correspond to our states, each having power to make its own local laws subject, however, to the civil, criminal, commercial and mineral codes when such should be enacted by the national congress. (Argentine Const., Arts. 105, 108 and 67 [10], vol. 9, Senate Exec. Doc.) The treaty with this country was made in July, 1853. At that time the public men of that country must have been very familiar with the form of government of the United States and with the fact that it committed local affairs to the several states. It is not probable, therefore, that the words of the treaty under consideration were chosen with the intent to have the international agreement become a part of, and in part supplant, the laws of the states of the United States, or of the Provinces of Argentina, in matters committed solely to the states or provinces. The assertion that an intervention, as our law defines it, was not known in civil law countries is shown to be without foundation by the foregoing citation of Bouvier to Pothier, and also by the fact that our own code definition of an intervention, and that of many of the other states, is taken from the code of Louisiana. (*Horn v. Volcano W. Co.*, 13 Cal. 69.) The procedure and jurisprudence of that state, as is well known, was derived from the Code Napoleon and from the system in use in the early Spanish American colonies, both of which are adaptations of the civil law. Justice Feld said in *Geofroy v. Roggs*, 133 U. S. 271, with regard to the construction of treaties:

As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.

Appellant quotes this canon of construction as decisive of the sense in which the word "intervene" is to be understood. The court in that case held that the phrase "in all the states of the Union," in the clause of the treaty with France giving citizens of France the right to inherit the property of citizens of the United States, included the District of Columbia. The subject in hand and the context indicated that the phrase was used in the most comprehensive sense, to include the entire country. But treaties are subject to the same rules of interpretation as other documents. The clause of the Argentine treaty relates to legal proceedings for the settlement of estates and the words used are to be given the meaning they usually have when used in that connection. The right to intervene in a legal proceeding partaking of the nature of a proceeding *in rem* is not usually understood to include the right to take the property from the custody of the court, or from the officer upon whom the laws of the country impose the duty of administering and distributing it. The object and purpose of the treaty would be fully met by allowing the foreign consul to represent the citizens of his country who are interested as heirs or creditors in case they are not present or otherwise represented, giving him the right to appear in court for them, either officially, or in their name, to protect their interests, and requiring that he be served with notices to them, when notice is required. The use of the word "intervene" implies an intention to give a right to the consul to appear as a party in a pending administration or action carried on by another person, and not a right to institute and carry on the proceeding himself. He has, in addition, a duty pertaining to his office imposed upon him by his own government, that of seeing to the safe keeping and proper disposition of the effects of citizens of his country who may die while traveling, or while temporarily present in the country to which he is accredited, or even while residing therein, and for that purpose, in the absence of any other representative of the deceased having a better right, he may "intervene in the possession" of the estate, conformably with the laws of the country. The custom of nations would permit this and it may be that, if the public administrator refuses or fails to apply, the consul may petition for and receive letters to himself as the official agent for the persons interested. But the treaty is not to be understood as giving him such right in preference to those upon whom it is devolved by the laws of the country when they are present and ready to accept its possession and discharge their duty concerning it. The theory of respondent is, in our opinion, in harmony with the spirit and

purpose of the treaty and is in accord with the obvious meaning of the language used.

The order appealed from is affirmed.

SHAW, J.

We concur:

ANGELLOTTI, J.

LORIGAN, J.

HENSHAW, J.

MELVIN, J.

UNITED STATES V. C. A. ENGELBROCHT

(*United States Court for China*)

October 25, 1909

This is a criminal action instituted upon information filed by the District Attorney.

The information charges that on or about June 2, 1906, in Shanghai, China, the accused, at that time Marshal of the United States Consular Court for the District of Shanghai, embezzled certain funds which had been paid into said Court and which came into his hands as Marshal.

The accused has filed a plea-in-bar, alleging that, inasmuch as the action was not instituted within three years after the offence charged was alleged to have been committed, prosecution therefor is barred by the provisions of section 1,044 of the Revised Statutes of the United States.

The section referred to, reads:

No person shall be prosecuted, tried, or punished for any offence, not capital, except as provided in section 1,046, unless the indictment is found, or the information is instituted within three years next after such offence shall have been committed. But this Act shall not have effect to authorize the prosecution, trial or punishment for any offence, barred by the provisions of existing laws.

To this plea-in-bar the District Attorney has filed a replication alleging that said plea is not sufficient, because the law providing for the limitation of prosecutions in the jurisdiction of China is defined in Title XV of the Consular Court Regulations for China, and not by the provisions of section 1,044 of the Revised Statutes.

Section 82 of Title XV of said Consular Regulations reads as follows:

82. — Heinous offences, not capital, must be prosecuted within six years; minor offences within one.

The question presented to the Court is, does the Consular Regulation referred to furnish the rule of law for this jurisdiction, notwithstanding the provisions of section 1,044 with which it conflicts?

The question is not one of easy solution. It presents many difficulties by reason of the status of the Court as an extraterritorial Court, and the necessity thus arising for differentiating this Court from every other United States Court.

The jurisdiction of all our Federal Courts at home is clearly defined and the body of law which those Courts administer can be usually ascertained with little difficulty. This is not equally true of the extraterritorial Courts created by the United States, though the necessity for their existence and the authority under which they have been created has never been questioned.

The difficulties arise from the admitted fact that the powers of these tribunals have never been clearly defined.

Sections 4,083 to 4,130, inclusive, of the Revised Statutes of the United States, are a codification of the laws enacted by Congress to define the judicial authority conferred upon Ministers and Consuls in conformity with the provisions of treaties of the United States with China and other countries within which extraterritorial jurisdiction was to be exercised.

Section 4,086 specifies the body of law which shall be administered by such Courts.

The provisions of this section may be briefly summarized as follows:—

First.—The laws of the United States are extended over our citizens in China “so far as they are suitable” to give effect to the treaties with China.

Second.—In all cases where such laws are “not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies,” the common law, and the laws of equity and admiralty, “are extended in like manner over our citizens in China.”

Third.—If neither the common law, nor the law of equity or admiralty, nor the statutes of the United States, “furnish appropriate and sufficient remedies” the ministers, respectively, shall supply such defects and deficiencies by “decrees and regulations which shall have the force of law.”

Section 4,117 relates to rules of procedure of the Consular Courts and provides that they shall be made by the minister with the advice of the several consuls. It specifies various matters of procedure respecting

which the minister shall make rules and concludes with mandatory authority "to make such further decrees and regulations, under the provisions of this title as the exigency may demand."

It should be observed that this latter provision relates not only to matters of procedure covered in section 4,117, but, as stated, to such further decrees and regulations as the exigency may demand, "under the provisions of this Title," viz: Title XLVII, which includes section 4,086, hereinbefore referred to.

Section 4,118 provides for the publication of such regulations, decrees and orders and makes them binding and obligatory until annulled or modified by Congress.

Regulation 82, referred to, is one of the regulations thus adopted and it has not been annulled or modified by Congress.

On June 30, 1906, Congress created the United States Court for China.

It should be first noted that the jurisdiction of the Consular Courts in China, defined by the several statutes above cited, had been exercised for many years prior to the passage of the act organizing this Court.

The Act provides that the Consular Courts are still to exercise a limited jurisdiction.

This fact, the appellate jurisdiction given to the United States Court for China, the requirement that the Judge and District Attorney shall be lawyers of good standing and experience, and other manifest reasons, indicate that the general purpose of Congress was to provide a higher and more efficient tribunal than had theretofore existed in China for the exercise of the judicial functions authorized by the treaties with China.

The act is not long or elaborate in its provisions.

Section 4 relates to the body of law which shall guide the Court in the exercise of its jurisdiction.

First — The treaties must be complied with.

Second — Its jurisdiction must be exercised in conformity with the laws of the United States in reference to the American Consular Courts in China, which were in force at the date of the passage of the Act. This covers sections 4,083 to 4,130, inclusive, of the Revised Statutes (such as are applicable to China), and the Regulations, Decrees and Orders which have been promulgated in pursuance thereof which have been given the force of law. Sections 4,086, 4,117 and 4,118.

One exception is made, and this is the only one, viz: that sections 4,106 and 4,107, relating to summons of associates, shall not apply to this Court.

The significance of this single exception must be recognized. It can hardly be construed otherwise than as an affirmative confirmation of all the other then existing laws and regulations. The familiar maxim *expressio unius est exclusio alterius* obtains.

Third — It is provided that when such laws, viz: "the laws now in force in reference to American Consular Courts in China," are deficient in certain named respects, resort may be had to the common law and the law as established by the decisions of the courts of the United States.

The deficiencies specified in this section differ in language and substance from those described in section 4,086 of the Revised Statutes, and must be construed in connection therewith and as additional thereto.

There is nothing in this section of the Act which touches directly the question presented in the case at bar.

Section 5 relates to the procedure of the Court and provides that it shall be "in accordance, so far as practicable, with the existing procedure prescribed for Consular Courts in China in accordance with the Revised Statutes of the United States," the Judge being given power to modify and supplement said rules.

It is obvious that the particular Revised Statutes to which reference is made are those sections of the Revised Statutes which we have already recited, contained in Title XLVII in pursuance of which the then existing procedure had been adopted. The words "in accordance with" (last used) are merely descriptive and not words of limitation.

In other words the procedure of the Court which this statute provides are the existing Consular Regulations. The statute does not state that only such regulations shall be binding as the Court may find to have been made in harmony with the Revised Statutes of the United States. It could have done so very easily by the use of appropriate words. As the statute stands it is not rationally open to any other construction than that announced. The phrase "prescribed for Consular Courts in China in accordance with the Revised Statutes of the United States" is purely and simply descriptive.

All the existing regulations had been laid before Congress, as required by law, many years before this statute was passed, and it must be presumed, under well established doctrine, that Congress had full knowledge of these regulations. *Clinton v. Englebrecht*, 13 Wallace, 446.

In fact it appears to the Court that the provision referred to can not be considered as anything less than an affirmative recognition and confirmation of such of these regulations at least as relate to procedure.

Whether or not the Act must be considered as recognizing and confirming the whole body of these regulations existing at the date of the passage of this Act, the Court does not at this time undertake to say. It is proper to say, however, that Congress had this opportunity to annul or modify any of these regulations of which it did not avail itself. Whatever objections may have been theretofore made to these regulations, based on a denial of the constitutional authority of Congress to delegate its legislative powers, it seems clear to the Court that the present action of Congress, in respect to such then existing regulations as relate to procedure of the Consular Courts, operates not only as a confirmation of such rules but practically as an enactment of such regulations, exactly the same as if they had been verbally recited in the Act itself. However much their origin may be assailed, the regulations adopted under section 4,117 are now clearly and unquestionably made binding and obligatory on this Court by direct and specific enactment.

If section 1,044 of the Revised Statutes had theretofore any application in the Consular Courts of China, it has no force as a rule of procedure in the United States Court for China, because Congress has provided otherwise in the Act creating the Court.

Rule 82 of the Consular Regulations, is made the law of this jurisdiction respecting limitation of criminal actions. The Court so holds.

While this holding disposes of the plea-in-bar in this case, I deem it proper to state that there are other and additional grounds upon which the Court might be inclined to sustain the validity of such rule.

The Court will consider them somewhat briefly.

We premise that a grave distinction must be recognized between the system of jurisprudence provided for in the Constitution for the United States, and that which Congress has provided to meet extraterritorial emergencies created by treaties with foreign governments.

There is ample ground for contending that such legislation as Congress has passed upon this subject, was well within its constitutional powers.

These several sections of the Revised Statutes had for their purpose: "to organize and carry into effect the system of jurisprudence demanded by such treaties." — Section 4,117, Revised Statutes.

It was obviously another and entirely different system of jurisprudence from that already provided by Congress for operation within the geographical boundaries of the United States. The Constitution provides that all treaties made or to be made under the authority of the United States shall be a part of the supreme law of the land. — Article VI.

When a treaty duly made provides for the exercise of judicial powers by some officer of the United States within the borders of a foreign country, the necessity arises for organization of some system of jurisprudence to provide for the execution of the treaty in that respect. In the Ross case, the Court said:

By the Constitution * * * a government is ordained and established for the "United States of America," and not for countries outside of their limits. (140 U. S. 453.)

In that case it was sought to have the judgment of a Consular Court set aside because the accused was not given a trial by jury under guarantees secured by the Constitution. Following the sentence already quoted, Justice Field said:

The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury, when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad. * * * The framers of the Constitution, who were fully aware of the necessity of having judicial authority exercised by our consuls in non-Christian countries, if commercial intercourse was to be had with their people, never could have supposed that all the guarantees in the administration of the law upon criminals at home were to be transferred to such consular establishments, and applied before an American who had committed a felony there could be accused and tried. They must have known that such a requirement would defeat the main purpose of investing the consul with judicial authority. While, therefore, in one aspect the American accused of crime committed in those countries is deprived of the guarantees of the Constitution against unjust accusation and a partial trial, yet in another aspect he is the gainer, in being withdrawn from the procedure of their tribunals, often arbitrary and oppressive and sometimes accompanied with extreme cruelty and torture.

The power of Congress to create a system of jurisprudence for operation in foreign territory in fulfillment of treaty privilege, it has been asserted, may rest on the eighth section, Article I of the Constitution, which gives Congress the power to regulate commerce with foreign nations, and a subsequent clause of the same section which gives Congress power to enact laws to define and punish offenses against the law of nations and to carry into execution all powers vested by the Constitution in the Government of the United States or in any department or officer thereof. — Hinckley's *Am. Consular Jurisdiction*, p. 68.

The President, by, and with the consent of the Senate, is empowered to make treaties and as treaties become a part of the supreme law of the

country, it is not a far step nor a straining of constitutional provisions referred to, to hold that Congress derives from them full power to enact such legislation as is necessary to give full effect to treaty stipulations.

We do not at this time give further consideration to the questions thus raised since, in the judgment of the Court, a final determination of these questions is not necessary in order to dispose of the particular matter now presented to the Court.

But if it were possible that section 5 of the Act creating the Court could not be construed as confirming and enacting into law Rule 82 of the Consular Regulations, and thus amending to that extent section 1,044 of the Revised Statutes, there are still other rational grounds upon which to assert that said rule is the rule of procedure for this Court.

There are abundant authorities which sustain the rule that statutes of limitation are statutes of procedure and relate to the remedy. *Bishop on Statutory Crimes*, sections 175 and 176 and 264a; *Story, Conflict of Laws*, p. 793; *Lewis' Sutherland Statutory Construction*, p. 663; *Minor's Conflict of Laws*, p. 521; *Dacey on Conflict of Laws*, p. 71.

In *Pritchard v. Norton*, 106 U. S., p. 130, the Court said:

It is to be noted, however, as an important circumstance, that the same claim may sometimes be a mere matter of process, and so determinable by the law of the forum, and sometimes a matter of substance going to the merits, and, therefore, determinable by the law of the contract. This is illustrated in the application of the defense arising upon the Statute of Limitations. In the courts of England and America that defense is governed by the law of the forum, as being a matter of mere procedure: while in continental Europe the defense of prescription is regarded as going to the substance of the contract, and, therefore, as governed by the law of the seat of the obligation.

Mr. Secretary Bayard in a letter to Minister Denby, of April 27, 1887, gave full recognition to this principle, holding that the regulations embraced in Rule XV (which includes Rule 82)

is to be viewed as a rule of court expressing a principle open to modification by the court that issued it. It stands in the same position as do the equity rules adopted by the Supreme Court of the United States and courts of the several States, not as a statutory mandate, to remain in force until expressly repealed or modified, but as a principle and regulation of practice which it is open to the court to expand or vary as the purpose of justice may require.

Mr. Secretary Fish also recognized distinctly the right of the ministers to adopt rules of procedure.

II Moore's Int. Law Digest, pp. 620 and 621.

We are not at present concerned with Secretary Bayard's views respect-

ing the validity of such regulations as embrace substantive law. See also opinion of Attorney General Cushing, *Attorney Generals' Opinions*, Vol. VII, 495.

The integrity of this doctrine has also been recognized by the courts in numerous other cases than those above cited.

The case of *Hornbuckle v. Toombs*, 18 Wall. 648, was brought to the Supreme Court of the United States from the Supreme Court of the Territory of Montana.

A clause in the organic act of the Territory of Montana declared that the Constitution and all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory of Montana as elsewhere in the United States.

It was argued that by virtue of this enactment, all regulations respecting judicial proceedings which are contained in any of the acts of Congress are imported into the practice of the Territorial Courts, and that territorial legislation on the procedure of Territorial Courts which abolished the distinct forms and modes of proceeding in law and equity was therefore contrary to the said organic act.

The Court held that

this proposition is not tenable. Laws regulating the proceedings of the United States courts are of specific application, and are, in truth and in fact, locally inapplicable to the courts of a territory. There is a law authorizing this court to appoint a reporter. In one sense this law is not locally inapplicable to the Supreme Court of the territory, but in a just sense it is so. The law has a specific application to this court, and can not be applied to the territorial court without an evident misconstruction of the true meaning and intent of Congress in the clause of the thirteenth section above referred to. That clause has the effect, undoubtedly, of importing into the territory the laws passed by Congress to prevent and punish offenses against the revenue, the mail service, and other laws of a general character and universal application; but not those of specific application.

The acts of Congress respecting proceedings in the United States courts are concerned with, and confined to, those courts, considered as part of the Federal system, and as invested with the judicial power of the United States expressly conferred by the Constitution, and to be exercised in co-relation with the presence and jurisdiction of the several State courts and governments. * * * As before said, these acts have specific application to the courts of the United States, which are courts of a peculiar character and jurisdiction.

A reading of the laws of procedure of Congress relating to limitations in the Courts of the United States shows that they are not applicable to the United States Court for China.

Section 1,043 can be applied only to Courts in which the prosecutions are instituted by indictments.

Section 1,044 can be applicable only to Courts in which the prosecutions are instituted by indictments and informations.

In the courts in China indictments are not known and criminal prosecutions may be instituted by complaints of private parties. Also informations in the courts in China are provided for by laws different from the laws defining informations in the Courts of the United States.— Revised Statutes, sections 1,022 and 4,087.

These laws, therefore, are not applicable to this jurisdiction according to the holding of the above case.

And in the case of *Campbell v. Haverhill*, 155 U. S. 610, Justice Brown recognized the same doctrine.

The Revised Statutes provide that

the laws of the several States, except, etc. * * * shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.

It was argued that limitation laws of the States did not "apply" to "causes of action created by Congressional legislation and enforceable only in the Federal Courts." The Court held that this asserted a distinction rather than pointed out a difference. It also said,

If these actions be exempted from the State statute of limitations, it would undoubtedly follow that other statutes of a similar nature, adopting the local practice for certain purposes, would be equally inapplicable.

Indeed, if the local statutes of limitations be not applicable to these actions, it is difficult to see why the process, declaration, and other pleadings in the code States should not be in common law form, notwithstanding section 914 adopting the State practice in that particular; or why, in every other respect, the suit should not be conducted regardless of the laws of the particular State.

The truth is that statutes of limitations affect the remedy only, and do not impair the right, and that the settled policy of Congress has been to permit rights created by its statutes to be enforced in the manner and subject to the limitations prescribed by the laws of the several States.

It would seem that the same principle would apply to criminal cases in China, since the local procedure has been adopted in criminal as well as in civil cases. Reference to section 4,087 of the Revised Statutes will show how fully this matter of procedure in criminal cases has been entrusted to local officials. Even the informations shall be authenticated in such way as shall be prescribed by the minister. It might well be asked how can the term information in section 1,044 be held to apply to

a pleading which might be and in fact is, different from an information provided by Congress for the United States?

Under these authorities the Court would be inclined to hold that Rule 82, promulgated by the ministers under section 4,117 of the Revised Statutes, was a part of the procedure of the Court and was operative notwithstanding its conflict with a general statute of the United States.

The statute of limitations, codified in section 1,044 was passed in 1794.

The Rule 82 was promulgated in 1864 and was subject to annulment or modification by Congress and was made binding and obligatory until so annulled. Without annulment Congress amended the General Act in 1876, substantially maintaining it in force.

It is a settled rule of construction that when there is a general law applicable to the entire state and a special law applicable in a particular locality only, the special law will govern in the particular locality.

This rule is clearly stated by Black on *Interpretation of Law*, 117, and Lewis' *Sutherland Statutory Construction*, Vol. 1, 526, 7 and 8, and cases cited.

The later author says:

It is a principle that a general statute without negative words will not repeal by implication from their repugnancy the provisions of a former one which is special, local, or particular, or which is limited in its application, unless there is something in the general law or in the course of legislation upon its subject-matter that makes it manifest that the legislature contemplated and intended a repeal. It is the established rule of construction that the law does not favor a repeal by implication, but that where there are two or more provisions relating to the same subject-matter they must, if possible, be construed so as to maintain the integrity of both. It is also a rule that where two statutes treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although latest in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject-matter as far as coming within its particular provisions. A special statute providing for a particular place, or applicable to a particular locality, is not repealed by a statute general in its terms and application, unless the intention of the legislature to repeal or alter the special law is manifest, although the terms of the general act would, taken strictly and but for the special law, include the case or cases provided for by it. (Lewis' *Sutherland*, pp. 526-529.)

This well recognized doctrine has even more potent application when, as in this case, the particular locality in which the special law is to have effect, is entirely outside of the boundaries of the United States and under a special system of jurisprudence.

For reasons already stated the Court does not deem it necessary at this time to consider these several grounds further.

The Court has not overlooked the fact that many of these regulations are gravely defective. It may well be that Congress so regarded them as it has given to the judge of this Court authority to modify and supplement such rules of procedure.

In due time the task of curing these defects will be undertaken. Meanwhile these rules of procedure are binding and obligatory and must be administered.

The plea-in-bar is overruled.

RUFUS H. THAYER,
Judge.

BENCINI AND QUISTAS V. THE EGYPTIAN GOVERNMENT AND THE GOVERNMENT OF SOUDAN ¹

Mixed Tribunal of First Instance at Cairo, Civil Chamber

April 2, 1910

The Tribunal, after having deliberated in accordance with law, reasoning on civil grounds;

Considering that the contractors Bencini and Quistas claim from the Egyptian Government and the Government of Soudan jointly and severally payment of certain amounts for work done at Port-Soudan;

That they contend that the Provinces of Soudan have never ceased to be an integral part of Egypt and that therefore the Egyptian Government was responsible for obligations contracted by the Government of the Soudan;

Considering that, in face of such contention, the Egyptian Government pleads its irresponsibility, pointing to the conventions between it and the British Government under date of January 19, 1899, under the terms of which the Government of Soudan is an autonomous government, absolutely distinct and separate from the Egyptian Government and should therefore alone respond to the obligations contracted by it without the intervention of the Egyptian Government;

That such being the case, in the case at issue the plaintiffs having dealt directly and exclusively with the Government of the Soudan the latter Government alone can be sued on account of the obligations concerning it and that, consequently, the Egyptian Government is not concerned in the law-suit;

¹ Translated from the French by M. M. Hanna, of the Department of State.

Considering that the Government of the Soudan refuses to entertain the competence of the mixed jurisdiction because, in the first place, such jurisdiction does not extend to the territory constituting the Soudan and in the second place the convention of the 19th of January, 1899, has established in the conquered territory of the Soudan a "condominium" forming in reality a government which, although emanating from the British power as well as from the authority of the Khedive, legislates, administers and judges in an absolutely independent fashion; has a double flag, distinct from the Egyptian flag which alone has no authority;

Considering that, from this defense of the two Governments, which take their arguments from the same source, the two following questions may be raised:

1. What was the territorial extent of the mixed jurisdiction during the period preceding the convention of 1899?

2. What is the situation created by the said convention?

Concerning the first question:

Considering that the Egyptian Government and the Government of the Soudan maintain that, by Article 4 of the Supplementary and Transient Provisions for the execution of the Regulation of Judicial Organization and Table II annexed to said Provisions, the territorial bounds of the Tribunal of Cairo include Upper Egypt up to and comprising Assouan, and excluding therefore the parts beyond;

Considering that it may, nevertheless, be remarked that the Decree of the 17th of November, 1881, issued by the Egyptian Government, formally provided that all the laws and decrees promulgated by the Khedival Government are to be executed throughout all the territory of the country and comprised the Soudan and other dependant countries of Egypt;

Considering that it therefore appears incontrovertible that this Decree, which fixes the extent of the territory of Egypt, carries with it the application "*ratione loci*" to all the Egyptian and foreign administrative and judicial authorities within the limits of the competence vested in them by the laws in force;

Considering that, concerning the Reform Courts, Article I of the Mixed Civil Code provides that: "The laws comprising the present Codes are executable throughout Egyptian territory;"

That, since that time it is needless to say that the Soudan, a dependency of Egypt and an integral part of it, is subject to the mixed jurisdiction within the limits of its competence, inasmuch as it is regulated by the provisions of Article 9, and in accordance with the Regulation of Judicial Organization.

Considering further that it could not be otherwise without reversing the fundamental principle of the judicial reform which must necessarily be substituted and is in fact substituted as a new jurisdiction over the old throughout the Egyptian territory for the mixed proceedings conducted under the consular jurisdiction and for the others vested in it;

Considering that it is also in this sense that the jurisprudence of the Court of Appeal was given in the decisions of the 10th of January, 1878 and 31st January, 1901;

In the former decision the Court said:

Considering that objection might be made unavailingly that the territorial bounds determining the jurisdiction of the Reform shall be settled by Table II, annexed to the Transitory and Supplementary Provisions, published in the year 1876, after which the territorial extent of the Tribunal of Cairo, extending to Assouan, does not include the city of Khartum, seeing that the provisions of this regulation are merely supplementary to the execution of the Regulation of the Judicial Organization; that consequently the aim of this Regulation was not and could not be to detract from the provisions of the said Regulation but rather to classify the different cities of Egypt within a determined limit.

Considering that since then the city of Khartum, being within a territory forming the prolongation of Upper-Egypt, the affairs of which have been submitted to the Tribunal of Cairo, the Tribunal of Cairo was competent to take cognizance of the litigation.

In the second decision the Court said:

Considering that there is no occasion to ascertain the ownership or administration of the Soudan subsequent to the 19th of January, 1899, it is clear that upon the date when the facts to which objection is made took place — that is in December, 1898, the Soudan was an integral part of Egypt and all its civil or military officials without exception who exercised any authority there whatever were appointed by the Egyptian Government and were entirely dependent upon that Government;

The action has been, therefore, competently taken before the Mixed Tribunal of Cairo..

Considering that it is true that, by the decision of January 10, 1889, the Court decided in another sense, it may be observed that the question submitted to the Court in that case was to ascertain whether a sheriff of the Mixed Tribunal could properly serve a summons at Massaouah upon Aly el Roubi, former general of the Egyptian army residing in the said city, at that time occupied by the military and administrative forces of a foreign power, and that it had responded negatively to the inquiry, basing the reasoning upon Table II without in any way considering the question of the competence of the Mixed Tribunal to pass upon past events in Egyptian Soudan.

Considering, under these circumstances, that this decision does not settle the question under examination, it should not be cited in connection with the two decisions above quoted in favor of the contention of the defense;

Considering that, furthermore, as regards mortgages, the competence of the Mixed Court of Cairo has been recognized as to transfers of property in the Soudan, contracts of sale and mortgages having always been registered and recorded upon request of the interested parties by the registrar's office of the Mixed Tribunal of Cairo, without any difficulty at all up to 1899, and that it is only since the convention of January 19, 1899, that notice was given, through the Egyptian Minister of Justice, to the Court relative to the boundaries recognized by the Government to the mixed jurisdiction debarring Soudan, notice of which the Court has taken cognizance in advising this Tribunal that hereafter the records and registrations shall not be made except at the risk and hazard of the interested parties, one must hold without hesitation that the mixed jurisdiction prior to the convention of January 19, 1899, extended throughout the territory of Egypt and comprised the Soudan.

Concerning the second question:

Considering that the Convention of the 19th January, 1899, provides by Article 8 that the mixed jurisdiction does not extend to the Soudan, and that the supplementary convention of the 10th of July, 1899, applies that provision to the city of Souakim which had been before that reserved;

Considering that it should, nevertheless, be said that one must not detach that provision of the convention, considering it by itself, and setting it aside as contrary to the international treaties which created the reform tribunals;

That, on the contrary, it is necessary to consider the convention in its entirety and, in order to appreciate its value and intent, to review all the facts and causes which preceded it and gave rise to it;

Considering that it is a historic fact that, after the insurrection of the Mahdistes and the coming into power of the Mahdi, the Soudan had to be abandoned in fact by Egypt and that afterwards, in the meeting of the Council of Ministers under date of the 26 April, 1888 (corresponding to the 13 Chanban 1305 — see compilation of Official Documents, 1888, p. 425) it was decided that the Mouderieh of the frontier — of which the seat is at Assouan — should be bounded on the south by the Wadi-Halfa district;

Considering that one is then constrained to conclude that Egypt in thus fixing its southern frontier deemed the Provinces of Soudan as temporarily lost and separated from Egypt, without however abandoning them definitely but awaiting a propitious moment to recover them;

Considering that it therefore appears that one must admit as a resultant consequence that by force of circumstances the mixed jurisdiction of the Soudan has been suspended and should revive "*ipso juri*" at the moment when by reconquest the Soudan should have become once more, as it was previously, an integral part of Egypt.

Considering that since such reconquest did in fact take place ten years later, but not by Egypt alone but by the united military and financial forces of the Khedive and of the British Government, it follows that Great Britain today has a title not only as the Power in occupation of Egypt but over and above that, according to the law of nations, the right acquired by conquest which gives it the same title as Egypt.

Considering that, therefore, it should not be overlooked that the situation of the Soudan vis-a-vis with Egypt is not the same since the reconquest as it was before;

That in fact the Soudan did not revert to Egypt free from all burdens, but was encumbered with the rights of conquest accruing to the conqueror, Great Britain, who assisted in the success in large measure and can claim compensation on its own account;

Considering that this right of conquest has been precisely regulated in international agreements between the conquering powers;

Considering that it is only necessary to read the several articles which comprise the convention in order to see what the agreement provides for the future administration of the Soudan, reconquered and again submissive, and the conditions of such administration;

That an actual "condominium" was agreed upon for the benefit of the conquering states;

That so to speak a new state, distinct and separate from Egypt, has been created, which has the right of administering and legislating and judging;

That Article 2 provides that the British and Egyptian flags shall together float over the Soudan which clearly indicates that the Egyptian flag alone has no authority there;

That a special customs tariff regulating the importation of merchandise not only from foreign countries but even from Egypt has been established;

Considering that it is then manifest that the convention under con-

sideration is an act of sovereignty emanating not only from the sovereign power of Egypt but also from that of Great Britain;

Considering that the convention therefore comes within the provisions of Article II, paragraph 2 of the Judicial Rules of Organization which read:

Reform tribunals cannot take any cognizance of acts of sovereignty, nor of any measures of the Government in execution and conformity with the laws and regulations of public administration;

Considering that it seems therefore difficult to follow the defendants upon the ground which they have taken in claiming that the Mixed Tribunals can apply, in the exercise of their functions against foreigners, only the laws which have been approved and sanctioned by the powers;

Considering that in fact even if this view-point were correct, in dealing with a modification of the provisions of the codes submitted to and accepted by the powers who have adhered to the reform, it is not a matter to consider in the present case, where the question is purely political and has been regulated between the two powers who united in the reconquest of the Soudan;

Considering that, such being the case, it must be admitted that only the interested powers, whether the powers which have adhered to the reform, or the Sublime Porte as the sovereign state, are qualified to criticize, reject or accept the convention;

Considering that the Tribunals of the Reform are not competent to substitute themselves for the powers in order to do so, when it is taken into account that they exist through the will of the powers and receive their authority from the sovereign of Egypt;

Considering that the judicial authority need not then investigate whether the convention fixing the right of conquest is not legally circumscribed, in a just and equitable way, and it need not concern itself whether the powers have acquiesced in that convention or whether, in the absence of a formal adhesion, the questions dealt with in the convention are, until further orders, suspended so far as concerns the powers interested therein;

Considering that it follows that the judicial authority must respect the convention and the decision, if not before a citation of law at least before a citation of fact, the said convention having actually been put into execution;

It only remains to consider the contents of the convention and to draw therefrom the effect upon the question before us;

Considering that since it has been shown that the convention excludes the mixed jurisdiction from the Soudan, it should be said that under the present state of affairs, on the one hand the mixed jurisdiction cannot proclaim its competence to judge a mixed process which arises in the Soudan, and, on the other hand, since the Soudan is independent from Egypt, the Egyptian Government has nothing to do with the present litigation, not having treated directly or indirectly with the claimants and it must be considered as having nothing to do with the case;

Considering that the losing party must bear the cost.

On these grounds, —

It is decided, after hearing both parties (without giving a decision concerning more detailed or contrary conclusions, except to reject them) :

The Government of Egypt is out of the case.

And it is decided upon the evidence of the plaintiffs and the Government of Soudan that the Tribunal is incompetent.

The plaintiffs are condemned to the cost.

Decision given at the public session of the Mixed Tribunal of Cairo, reasoning on civil grounds, April 2, 1910.

Present: MM. Herzbruch, President; Rassim Bey, Eeman, Wierdels, Fuad Bey Gress, Judges; Rouchdi, Substitute; Konceqicz, Registrar-clerk; Habib, Interpreter.

The President, (Signed) HERZBRUCH.

BOOK REVIEWS¹

A History of Canada, 1763-1812. By Sir Charles Prestwood Lucas. Oxford: Clarendon Press. 1909. pp. 360, (8 maps).

This new volume by the present Head of the Dominions Department of the British Colonial Office, who has recently been honored with a title in recognition of his long and meritorious services in the Colonial Office and his excellent literary and historical work, is to be read in connection with his previously published book on *The Canadian War of 1812*. The period covered by this new volume is that during which the relations of Great Britain, the United States and Canada were settled upon their present basis; Canada being left in such a position as to form a connecting link between Great Britain and the United States.

The author very properly considers the American Revolution as a part of the history of Canada and analyzes the causes which led the American Colonies to declare their independence. The four chapters (two-thirds of the book) which are given up to a consideration of the period from 1763 to 1783, are principally concerned with the Revolution. The last two chapters deal with the questions arising from the presence in Canada of a large French population living under feudal conditions, and predominating, in numbers at least, over a body of native-born British subjects, partly restless adventurers and partly peace-loving loyalists exiled from the United States.

The conclusion of the author regarding the Revolution is, that the American Colonies declared their independence without adequate cause. The Revolution was, in his opinion, simply an expression of their desire for independence, latent in their minds from the earliest times; this desire being increased by Great Britain's lack of system in dealing with them. The Colonies were, in his opinion, able to accomplish their desire because, when the test came, Great Britain, on account of its internal dissensions and the corruption in its administration, was unable to prevent them.

This judgment of the author is reached after an examination of only the social and economic causes of the Revolution. Holding these causes

¹The JOURNAL assumes no responsibility for the views expressed in signed Book Reviews. — J. B. S.

inadequate, he concludes that the case is made out against the Americans and that they revolted simply because they wished to revolt. The political causes of the Revolution he dismisses in the following language (p. 37):

The constitutional question as to whether the Colonies were subject to the Parliament of the mother country or to the Crown alone may [for the purpose of determining what place the episode of the severance of the British North American colonies holds in the history of colonization] be omitted; for the story of the troubled years abundantly shows that theories would have slept, if certain practical difficulties had not called them into waking existence, and if lawyers had not been so much to the front, holding briefs on either side.

It is too frequently assumed, as the author assumes, that theories of political relationship are of no consequence, provided the actual political relationship existing between the parties is such that under it no severe social or economic oppression of one party by the other in fact exists. This assumption has often been made by states having colonies, and is still made, as the above quotation shows. But more and more it is becoming necessary to realize that the theories of political relationships are important. Less and less are civilised countries willing to recognize themselves as subject to the legally-unlimited will of an external power, however benevolently that absolute will may be exercised. The American Revolution was a great event in history because it was fought to establish a political theory. It is true, as the author says, that American lawyers were at the bottom of the Revolution, but they were great lawyers, and the universal sentiment of America and of the whole western hemisphere has approved their opinion. The following brief statement may perhaps serve to show their conclusions and the process by which they were reached: The attempted taxation of the Colonies by Acts of the British Parliament in 1764 was met by four objections; first, that such taxation was in violation of the fundamental compact, then assumed to exist, according to which Great Britain was obliged to protect the Colonies at its own expense in consideration of their giving Great Britain the right to monopolize their trade through reasonable regulations of trade made by the British Parliament and acquiesced in by the Colonial Legislatures; second, that inasmuch as the Colonies could not be fairly represented in Parliament on account of their distance from Great Britain, such taxation was opposed to the British Constitution; third, that such taxation was contrary to the colonial charters; and fourth, that it was contrary to "the inherent rights and liberties" of the Americans. In 1766,

Great Britain, on repealing the Stamp Act, rejected this assumed fundamental compact and declared its "right," through its Parliament, to "legislate" so as to bind the Colonies "in all cases whatsoever." Such a "right" necessarily implied a legally-unlimited power of legislation for the Colonies; and a legally-unlimited power of legislation of course implied a legally-unlimited power of taxation, since taxation is only a kind of legislation.

The Colonies at once met the British claim of legally-unlimited power by a claim that the power of Great Britain over the Colonies was limited, and set themselves to determine the kind of power which Great Britain ought to exercise over the Colonies, hoping to have the question settled by a new and express fundamental compact between the two countries and thus to avoid the question concerning the origin of the limitations which they were asserting. During this period—from 1766 to 1775—the conclusion was reached in America that the power of Great Britain over the Colonies was either executive power pure and simple, or executive power accompanied by a power of executive legislation sufficient to make the executive power effective. The leaders of the party holding the former opinion were Adams and Jefferson. Dickinson and Washington led the other party. In 1773, Great Britain, after some years of indecision, concluded to adhere to the claim of legally-unlimited power. The attempt to enforce the tax on tea—a tax itself wholly insignificant—was an overt act on the part of Great Britain evidencing its design to enforce its claim of legally-unlimited power, and as such, was met by the Americans with prompt resistance. All expectation that Great Britain would agree that its powers over the Colonies were legally-limited being thus nearly at an end, the Americans were driven to consider what was the nature of the law under which the powers of Great Britain was legally-limited. The argument based on an assumed extension of the British Constitution to the Colonies was weak, because they could not prove that that Constitution had been so extended, and when they came to examine the British Constitution they found that it was nothing but a fiction; for though the conception of a true British Constitution which should be the supreme law of the land had been evolved in England during the period from 1688 to 1710, the idea had been strangled at its birth by the British Parliament claiming to be at once the constitutional convention and the general legislature. Nor could the Americans rely upon the colonial charters, for in one of them at least the power of Parliament over the Colonies was asserted in such a

way as to give a basis for the British claim. When the Continental Congress met in 1774, the Americans thus found themselves in a position where they felt it was doubtful whether they could safely rest their case upon a law which had for its basis the British Constitution or the colonial charters, and where they began to realize that it might be necessary to base their case on the fundamental principles of natural law and justice. John Adams, in his *Diary*, narrating the proceedings of the Committee on Resolutions, and describing their deliberations, says:

The two points which labored the most were: 1. Whether we should recur to the law of nature, as well as to the British Constitution and our American charters and grants. Mr. Galloway and Mr. Duane were for excluding the law of nature. I was very strenuous for retaining and insisting on it, as a resource to which we might be driven by Parliament much sooner than we were aware. 2. The other great question was, what authority we should concede to Parliament; whether we should deny the authority of Parliament in all cases; whether we should allow any authority to it in our internal affairs; or whether we should allow it to regulate the trade of the Empire with or without any restrictions.

The result was that in the preamble of the Declaration of Rights and Grievances of October 14, 1774, the proposition of the American Colonies that the powers of Great Britain over them were legally-limited was based on "the immutable laws of nature, the principles of the English Constitution, and the several charters and compacts."

By the second Address to the King of July 8, 1775, the Americans, in order to make it clear that the dissolution of the British Empire, if it occurred, should not be attributable to their action, formally petitioned the King to use his efforts to have the dispute settled by Imperial conference or, in the last resort, through Imperial arbitration by the British Crown. When this petition was ignored, the Americans abandoned as impracticable any further attempt to rest their claim on the British Constitution or the colonial charters, and in the preamble of the Declaration of Independence based themselves solely upon "the law of nature and of nature's God," asserting that all rightful governmental power everywhere is legally-limited by this universal supreme law, and that hence it was under this universal supreme law that the powers of Great Britain over the Colonies were legally-limited. The preamble of the Declaration contained the steps in the argument for the existence of such a universal supreme law, as those steps were determined by the Continental Congress during their long discussion. This "law of nature and of nature's God" was declared to have its origin in the common and

equal necessity of all men to preserve the attributes of life, motion and prehension, which are common to all, and which, as necessary to all, and arising equally by "endowment of the Creator," are self-evidently "unalienable." From the proposition that each man, equally with all others, by reason of his creation by a Creator, possesses certain attributes which are necessary to self-preservation and "unalienable" without self-destruction, the existence of a supreme universal law was inferred under which each man as against all individuals, governments and states has "rights" which are "unalienable." These rights are spoken of as "certain unalienable rights, among which are life, liberty and the pursuit of happiness," and evidently correspond to the attributes of life, motion and prehension, which are equal, common and necessary to all. This supreme universal law was declared to rest upon "the opinions of mankind," which are entitled to "a decent respect." Thus at the outset this nation asserted rights against Great Britain under international law — that law being regarded as an international equity based on the common experience and formulated by the common opinion of civilized mankind. The existence of rights necessarily involves legal limitation of the powers of the party against whom the right exists, and the assertion by Great Britain of a claim of legally-unlimited power, persistently followed by acts evidencing an intention to enforce this claim, was rightly held by the Colonies to be a dissolution of the social bond and hence a dissolution of the political connection between the two countries.

By the Declaration of Independence, therefore, the issue raised was, whether a state or a government sufficiently strong to enforce its will may rightfully exercise legally-unlimited power, or whether the conception of legally-unlimited power is rationally impossible and unthinkable, being opposed to a self-evident supreme universal law by which the powers of all states and all governments are legally-limited. The success of the Americans in the War of Independence left the United States free to carry into effect the principle for which the war had been fought. The principle was accepted by each of the States simultaneously with the announcement of it in the Declaration of Independence, each State making its own interpretation of this supreme law by forming a written Constitution assumed to emanate from the common conscience and common intelligence of the people of the State and limiting the powers of government. In 1787, the principle was applied to the whole United States by the adoption of a written Constitution which was declared to be "the supreme law of the land." In 1796, the principle was applied by President Washington, in his Farewell Address, to all American foreign rela-

tions; and in 1823 the South American states, having accepted the principle, received from the United States a guarantee of the maintenance of the principle through the declaration by President Monroe of the Monroe Doctrine. In recent years, the principle has been applied by the Supreme Court of the United States as governing the relations between this nation and the countries under its jurisdiction.

In the opinion of the reviewer, therefore, the author is far from being correct in "omitting" what he calls "the constitutional question," since the Revolution was fought on a question of political theory of the most far-reaching kind, and did in fact result in determining the question according to the American contention. The failure of the author in this respect — if there be a failure, as the reviewer believes — does not, however, affect the value of the book as a history of Canada from 1763 to 1812; for during that period American ideas had little influence in Canada; but a history of Canada from 1812 to the present time which should take no account of the effect upon Canadian institutions of those American political ideas which have their beginning in the American Revolution would indeed be imperfect.

Some of the conclusions of the author regarding the effect of the success of the American Colonies in the Revolution upon the development of the British Empire are profound and interesting. Summing up the results of the Treaty of Peace of 1783, he says (pp. 206, 207) :

Though the United States, in the war and in the treaty which followed it, attained in the fullest possible measure the objects for which they had contended, it is a question whether, of all the countries concerned in that war, Canada did not really gain most. * * * Had the United States remained British possessions, Canada must eventually have come into line with them, and been more or less lost among the stronger and more populous provinces. The same result would have followed, had the British Government entertained, as their emissary Oswald did, Franklin's proposal that Canada should be ceded to the United States. * * * The result of the War of American Independence was to make the United States a great nation; but it was a result which, whether with England or without, they must in any case have achieved. The war had also the effect, and no other cause could have had a like effect, of making possible a national existence for Canada, which possibility was to be converted into a living and potent fact by the second American war, the war of 1812.

Of the effect of the War of Independence on the development of the British Empire, he says (pp. 32, 204, 205) :

What would have happened if the revolting colonies had not made good their revolt must be a matter of speculation, but it is difficult to believe that if the

United States had remained under the British flag, Australia would ever have become a British colony. There is a limit to every political system and every empire, and, with the whole of North America east of the Mississippi for her own, it is not likely that England would have taken in hand the exploiting of a new continent. At any rate, it is significant that, within four years of the date of the treaty which recognized the independence of the United States, the first English colonists were sent to Australia.

The present broad-based Imperial system of Great Britain was for two reasons the direct outcome of that war. While the United States were still colonial possessions of Great Britain, they overshadowed all others; and, had they remained British possessions, their preponderance would in all probability have steadily increased. It is quite possible that the centre of the Empire might have shifted to the other side of the Atlantic; it is almost certain that the colonial expansion of Great Britain would have been mainly confined to North America. Nothing has been more marked and nothing sounder in our recent colonial history than the comparative uniformity of development in the British Empire. In those parts of the world which have been settled and not merely conquered by Europeans, and which are still British possessions, in British North America, Australasia, and South Africa, there has been on the whole parity of progress. No one of the three groups of colonies has in wealth and population wholly outdistanced the others. This fact has unquestionably made for strength and permanence in the British Empire, and it is equally beyond question that the spread of colonization within the Empire would have been wanting, had Great Britain retained her old North American colonies. Unequalled in history was the loss of such colonies, and yet by that loss, it may fairly be said, Great Britain has achieved a more stable and a more world-wide colonial dominion.

The book shows the same painstaking study and attention to details as the *Historical Geography of the British Empire* and the others written or edited by the author. It is an important addition to the works on the general history of the British Colonies in America as well as to those on the history of Canada.

ALPHEUS HENRY SNOW.

British Colonial Policy, 1754-1765. By George Louis Beer. New York: The Macmillan Company. 1907. pp. vii, 316.

As the title shows, this book is concerned with the relations between Great Britain and the American Colonies from 1754 to 1765. The author presents a valuable mass of facts, drawn from his personal investigation of foreign archives, concerning both the war-relations of Great Britain and the American Colonies with France during this period, under the heads of imperial defence and requisitions for this purpose, and the peace-relations between the two countries, under the heads of

regulation of trade, local administration, taxation for these purposes, and treatment of the native tribes.

In the opinion of the reviewer, the ideas of the Americans from 1754 to 1765 are interpreted by the author too narrowly from the contemporary facts and documents, as if that period had no connection with the period before and after it; so that he mistakes in many ways the motives of the Americans and does them injustice. It is only by viewing the history of the American Colonies from 1606 to 1783 as a whole that a correct idea of their political conceptions can be gained and the motives of their political actions understood. Though the American Colonies from 1754 to 1765 were, as the author shows, in one sense a collection of heterogeneous units, each acting for itself, there existed, even at that time, as later events proved, a homogeneity and unity among them which they themselves did not fully realize. There was during that period a common belief in the existence of a fundamental compact between Great Britain and the Colonies, implied in fact and acquiesced in by both parties, according to the terms of which Great Britain was obliged to provide, at its own expense, for the protection of the colonies and they in return were obliged to permit Great Britain to regulate their foreign trade (including the trade with Great Britain), and the intercolonial trade, to the extent necessary for the general welfare. As a part of this fundamental compact, they recognized the right of Great Britain to participate in their local administration to the extent necessary to make its protection and its regulation of trade effective. Every omission on the part of Great Britain to protect them at its own expense, they held to be a justification to them in ignoring the British regulations concerning their trade.

As early as 1700 it was recognized by the best informed men on both sides of the water that the only way to make this fundamental compact effective was to form a federation of the Colonies with a general legislature elected by them and under an executive appointed by the British Crown. It seems now clear that when the final judgment on the American Revolution is passed, it will be concluded that the original mistake of Great Britain was in not taking up the Albany Plan of Union of 1754 and pushing it to immediate completion. After the failure of the Plan of Union, the American Colonies kept on their guard more carefully than ever before, lest they might do anything which might be construed by Great Britain as an acquiescence by them in its claim to reject this fundamental compact and to exercise absolute legislative power over

them. The maintenance of the fundamental compact became the basis of the policy of each of the Colonies, and in spite of their being kept disunited by Great Britain, their common interest in maintaining the fundamental compact resulted in the formation of a steadily strengthening bond of union between them.

Looking at the history of British colonial policy from 1754 to 1765 from this wider standpoint, the history of that period is the history of an epoch during which Great Britain, under the necessity, as it believed, of economic pressure, made a serious attempt to abolish the fundamental compact so as to consolidate the military and financial resources of the Empire under the management of the British Crown and Parliament, and when the American Colonies began seriously to place themselves on their guard lest they might, by their acquiescence in the British measures adopted, give ground for a claim that they had acquiesced in such abolition of the fundamental compact and in the centralization of power contemplated by Great Britain. From this viewpoint, it is necessary to dissent from many of the author's conclusions. Thus he says (p. 71):

The experiences of the [French] War served but to re-enforce the conclusion reached by many in 1755, that the defense of the colonies in time of peace could not with safety be left to them because of their lack of union, and also that they could not be relied upon as a whole to provide voluntarily for their due proportion of the necessary military establishment.

It would probably be much nearer the truth to say that the Colonies were unwilling to provide for the common defence at their own expense, since this was contrary to the terms of the fundamental compact; Great Britain alone being responsible for the defence of the Empire in consideration of its having the monopoly of the trade of the Empire.

The author makes out a clear case of the Americans ignoring the British regulations of American trade; but the question which it appears he does not sufficiently consider is, whether, considering the attitude of Great Britain in questioning or denying its obligation to pay for the imperial defence, the Americans were justified in ignoring the regulations of trade.

The author apparently does not perceive that in the Revolution the American Colonies deserted the "mercantile system" and threw aside with it this old idea of the "fundamental compact," and every other technicality and fiction; and, meeting the British claim of legally-unlimited power with an unqualified denial, fought the war on the single proposition that the conception of legally-unlimited power ought to be

banished from the civilized mind as rationally unthinkable. He says (p. 309):

The policy of Grenville led directly to a searching inquiry into the nature of the imperial constitution. Colonial opinion was at the outset not clearly defined. It was, however, patent that parliamentary supremacy could be used as a powerful check on the tendency toward independence that had already, to a marked degree, manifested itself. This tendency is plainly visible in the facts of colonial history. But the colonists were, to a great extent, unconscious thereof, and, as a rule, asserted their loyalty to the mother country. Such assertions are, however, no proof of the existence of this sentiment. As in many other historical movements, the real motive was obscured because its revolutionary character would have injured the cause. * * * Their allegiance was purely utilitarian, and its fundamental basis had disappeared with the conquest of Canada. * * * It was this unconscious desire for complete self-government which could be realized only by political independence, that explains the intensity of the opposition aroused by Grenville's policy. As Osgood has said: "In this last idea, that of national independence, lies the secret spring of the revolt."

From this view of the causes of the American Revolution, it is necessary, in the opinion of the reviewer, emphatically to dissent. The reasons for this dissent are given in the preceding review of Sir Charles Lucas's *History of Canada, 1763 to 1812*.

ALPHEUS HENRY SNOW..

Vers La Paix Études sur l'Établissement de la Paix Générale et sur l'Organisation de l'Ordre International. By Alberto Torres. Rio de Janeiro: Imprensa Nacional. 1909. pp. viii, 115.

These studies, which form a volume of some one hundred and fifteen pages, are dedicated by the author to his wife and children.

Three pages are devoted to a justification and ninety pages to a *projet* for a conference for the establishment of a general peace and the organization of international order.

Twelve pages to the justification of and two to the *projet* for the organization of an international court of justice.

The arguments in the first justification are the usual ones against the waste and horrors of war expressed with epigrammatical effect in a language which lends itself easily to such composition.

Mr. Torres strongly advocates the necessity for adjusting the economic and social problems as a preliminary to international peace. He urges that the problem of pacification has arrived at the state of a practical problem and by the progress of civilization, and the development of re-

lations, social, political and economic between peoples, it is now placed on the same footing which the problem of the equilibrium of the nations formerly held between sovereigns.

He asserts that the rivalry of peoples of different races or divided by ancient dissensions is, in our age, a political fact, more artificial than natural, provoked by the acts of rulers and agitators with the end either to divert general attention from internal politics, to attract partisans or to flatter popular vanity. He believes, without counting philosophers, moralists and thinkers, that the majority of opinion is, over all, opposed to war; that the powerful nations have frankly arrived at the age of industrial civilization; that, in this society, neither capitalists nor workmen, nor any but a few who produce war supplies or adhere to some ancient forms of patriotism, see in the armed struggles of peoples any elements of progress; that the fight for life has evolved from the grosser combats into an intellectual concurrence; that contemporary monarchies are pacific because they depend for existence on peace. He believes that naval and land police will be the only armed forces of the nations of the future. He urges us to suppress the charges of war and its effect on the economies of the people and says the expansion of wealth will be stimulated and the probabilities of success in the struggle of life multiplied for all the world.

He points out that emigration makes life easier in both the old and new countries but that the "armed peace" hinders colonization on the part of the older countries and development on that of the new.

His first *projet* calls for a conference of representatives of all civilized nations. This conference may adjudicate questions between the nations from the point of view of law and equity, of the reasonable interests of each country and the interests of civilization; it may take notice of the aspirations of powers founded in the interest of civilization and human progress; it may establish the general peace by the disarmament of all the power reserving to each a force sufficient to preserve order; it may organize international justice and regulate its procedure.

It may organize, at the place where the court of international justice sits, the military and naval forces destined to guarantee international order, the stability of peace and the superior interests of humanity and civilization, also a bureau to administer these forces.

It may colonize and adjust population and adopt measures to ameliorate the conditions of the proletariat.

The delegates to this conference are to be accredited as ambassadors

with power to bind their several states even by the final signing of treaties.

The breach of an international engagement should be held a *casus belli* by all the other powers.

Questions submitted should be decided in each instance by commissions constituted according to the *projet* of organization of the court of international justice.

Elaborate rules for deciding territorial questions are prescribed in which a plebiscite of the men of the territory plays a chief part as well as ideas of convenience, topography and the (often recurring) "interests of civilization."

In the "justification" of the *projet* for the court of international justice, Mr. Torres points out that at the peace conference the organization of such a court was advocated by the great powers on a basis of representation founded on military force and with a preponderating share in the great powers; that the lesser powers objected to this and claimed absolute equality of representation on the basis of the law of nations.

He seeks to mitigate these differences in his *projet* by providing that each power name a delegate and a substitute and by classifying the powers in three categories.

When the powers pleading belong to the same category, the litigation shall be decided by the delegates of that category, excluding the delegates of the parties to the cause. Where the litigation is between two powers of diverse categories the commission to determine shall be composed of an equal number of judges from the two categories under the presidency of one from the third.

Causes between three or more powers belonging to three categories shall be adjudged by a commission chosen in equal number from all three categories, when the rights claimed are distinct. There are various other provisions for special cases.

There is no historical argument or comparison. No general review of the many kindred schemes, which are now spawned in every community and hatched in every printer's press.

This reviewer entertains such a hearty sympathy for the objects which are sought that he desires to avoid anything like censure on measures proposed in good faith for their advancement. However, he is in great doubt whether this good cause of universal peace is fostered by the great number of rhetorical dissertations, composed with little expenditure, apparently, of thought or research, each proposing, with remarkable con-

fidence, a grandiose fantastic but nebulous scheme of judicial and legislative control for the world. Their tendency, he fears, is to weary and alienate public interest and to make a noble topic stale and even ridiculous.

Chief Justice Ryan said long ago that "the record of human legislation was a record of error and presumption." It can not be said that the *projets* now epidemic among us are wholly free from the faults which the Chief Justice attributed to our legislation. All this ferment, deeply working throughout the civilized world, will, undoubtedly, result in great good but it will be accompanied with much froth.

We of the colder races follow the more ornamental composition of our tropical Latin brethren with some difficulty and a limited appreciation, but we must attribute this, in part, to our own idiosyncracies which are quite as marked as theirs. That these studies, *Vers La Paix*, may serve that good cause is our sincere wish but not our assured prediction.

CHARLES NOBLE GREGORY.

Die moderne Fortbildung des Internationalen Privatrechts. By Dr. F. Meili, Professor of International Law at the University of Zurich. Zurich: Orell Füssli. 1909. pp. viii, 35.

The axiom around which the argument of this thoughtful little pamphlet revolves is that modern needs demand modern methods of jurisprudence. The gradual conquest of physical barriers as affecting international intercourse has developed an extraordinary complexity in the legal relations of private persons; and the conflicts of jurisdiction and of law resulting from the increasing number of transactions between persons of different nationality, or of different national domicile, and from the greater mobility of private property, demand ever nicer adjustments.

The author has little confidence in the legislation of the nations working individually in this field. He believes that when the rules are simply local they may truly be designated "norms of conflict," for they induce conflicts as well as solve them (p. 4). The practice of European countries in holding official conferences at The Hague in order to arrive at international conventions creating uniform rules for the solution of conflicts of law and jurisdiction is heartily indorsed. The four conferences already held have resulted in treaties now in force between some or all of the fifteen participating nations, upon a limited number of topics. The provision for adherences is based upon the principle of *ne varietur* and thus the treaties constitute a sort of international union.

Gradually other topics will be covered and the author seems inclined to the belief that the development of international private law will be wrapped up in the work of these conferences much in the same way that international public law has received its direction since 1899 from the Hague Peace Conferences.

The purpose of the present work is to point out the most pressing needs in this field as well as some tendencies deemed unwise. The author proposes that official commissions be created in each state of the treaty union to study and report upon the practical workings of the treaty provisions in their respective jurisdictions and to make proposals based on practical observation to future conferences. Such commissions might well also certify opinions of the local law to foreign tribunals called upon to apply it under the treaties (pp. 24-25).

The author deplores that courts of last appeal in Germany and Switzerland refuse to review determinations of the lower courts where the error assigned is on the interpretation of foreign as distinguished from local law. This result is reached by reason of the interpretation given to the statutes giving such courts jurisdiction to review where an imperial or federal law has been violated. But the author very properly remarks (p. 11) that when a German statute requires the application of a foreign law, the German law would indeed seem to be violated if the judge does not properly apply the foreign law. •

Particular objection is made to the ever-widening scope of the *lex patriæ* as the controlling law in personal and domestic relations. It has been adopted as the standard in all countries except those of the Anglo-American sphere, Denmark, Norway and Switzerland. The Hague treaties have also favored it and yet it would seem to be most unsuited to a period of the greatest fluidity of population.

In the field of civil procedure, the author hopes that new impetus will be given the movement in favor of the execution of foreign judgments without re-examination on the merits (p. 18). Speaking generally, our own system raises only the questions of jurisdiction and fraud, yet the necessity of bringing a new action, coupled with the complex requirements of our statutes in the way of certification of the record, makes the execution of foreign judgments with us, as it frequently is in Europe, an illusory remedy. The author pleads in fact for a simplification of the methods of proof of *all* foreign records and documents and in this he truly strikes a responsive chord in the breast of the American practitioner. The requirements of our own statutes are so complicated as to be almost prohibitive. The very forms of administration in the foreign

state often do not permit of compliance. Relief may some day come through local legislation, but such reforms more often wait upon the inducement of reciprocity involved in regulation by international convention.

ARTHUR K. KUHN.

Die Gleichheit der Staaten. By Max Huber. Stuttgart: Verlag von Ferdinand Enke. pp. 88-118.

This pamphlet is a reprint of an article by Professor Huber, of the University of Zürich, which appeared in *Juristische Festgabe des Auslandes zu Josef Kohlers*, 60. Geburtstag, issued by Dr. F. Berolzheimer.

The article is divided into three parts, in the first of which Professor Huber discusses the events in the First and Second Hague Conferences by which the doctrine of the equality of states was brought into question. The various proposals leading to the erection of an International Prize Court and to the declaration in favor of a Court of Arbitral Justice are discussed, as well as the method of organizing the conferences themselves. The treatment in Part I is descriptive rather than critical, and is intended only as an introduction to Parts II and III.

Part II answers in the affirmative the question, Is the equality of states a fundamental doctrine of international law? Professor Huber excludes from consideration all cases of so-called "half-sovereignty;" treaties in which concrete matters affecting only the signatory powers are involved; cases in which, by treaty, powers are delegated to individual members of an administrative union; and ancient distinctions of rank among states. The concert of the great powers is discussed at length, with the conclusion that it not only lacks legal unity, but is not a politically homogeneous group. "The concert of the great powers," he says, "is much less an institution which stands in opposition to the minor powers, than it is an institution for adjusting the divergent interests of the great powers."

It is denied that the lesser powers have ever recognized the legal superiority of the great powers. Apparent violations of the principle of equality are explained on the ground that an independent state except in case of war acts voluntarily when it accedes to the wishes of another state. This is an academic conclusion that is far from convincing.

Among writers on international law mentioned by Professor Huber, he finds almost unanimous support for the principle of equality, and therefore asserts that "practise and doctrine agree that a legal differentiation of states and a legal hegemony of great powers do not exist."

In Part III, the author gives his conception of the meaning of equality, and its place in a system of international law. "Equality does not mean equality in actual possessions, or equality of influence * * * but merely legal equality, equality in respect to international rights and duties." A system of "relative" equality is declared to be impracticable. "A classification of all states, or only of the minor powers, according to a general standard, that is, according to a system of relative equality, would be opposed not only on account of the consequent violation of absolute equality, but still more on account of the arbitrary character of every attempt to discriminate between states."

Absolute legal equality should be maintained as a fundamental principle, and the endeavor should be to find that method of organization which corresponds to the essence of modern international law. The theory of political organization, as represented by the federation and confederation, is then examined, and a confederation of states, with due respect to the doctrine of equality, is declared to be possible and practical. But, "nothing can endanger the development of international law more than the attempt to establish rules and to introduce institutions which are not agreeable to great and small states alike. * * * The appeal of the lesser powers to that equality which is inherent in the principle of confederation, and which is the palladium of their independence, should not be condemned; because, on the basis of confederation and equality, a great development of international law is still possible. For the advancement of international law, a powerful organization is not necessary, but a political situation, in which the states, great and small, may meet with confidence."

Professor Huber has made a valuable contribution to the literature of this subject; but he does not prove that legal equality can, in practice, take the place of actual inequality, or that effective international organization is possible without violating the doctrine as understood by the minor powers.

FREDERICK C. HICKS.

England and the French Revolution, 1789-1797. By William Thomas Laprade (Johns Hopkins University Studies). Baltimore: Johns Hopkins University Press. 1909. pp. 232.

The author says that the original purpose of this study was to show to what extent the popular agitations in England during this period owed their origin to the revolution taking place in France. But it having

become apparent that these agitations were due to conditions existing in England itself, the policies and methods of William Pitt became the primary themes of study. This being the purpose, the author naturally devotes the greater part of his attention to a minute study of English internal political conditions. Incidentally he discusses the diplomatic relations between England and France. It is this incidental portion that will be of chief interest to the readers of this JOURNAL.

The author adheres to, emphasizes, and reveals much hitherto unused material in confirmation of, the generally accepted view of Pitt's absolute domination of English governmental policies during the period under consideration. He declares that during most of this period "Pitt had been ruling England according to the dictates of his own will" (p. 152). While acknowledging the power of the great minister, Mr. Laprade is far from being a hero-worshipper. He represents Pitt's methods and policies as those of the political boss.

He had not obtained his power by any usurpation of functions which did not properly belong to his office. He did not retain it by opposing his wishes to the desires of a majority of the governing body. His method was to manipulate the men on the political chess-board in a manner that would give him the appearance of acting in accordance with the popular wish while in reality he was carrying out his own plans. (*Id.*)

The principal thesis of the monograph is laid down in the conclusion (p. 184):

In its early stages the French Revolution was regarded favorably by the majority of Englishmen, but was considered a subject rather for speculation than as vital to the interests of England. Gradually this favorable view of the revolution gave way to one that was distinctly hostile, due as is commonly supposed to the influence and the writings of Edmund Burke. We believe, however, that this change of opinion may be attributed in slight measure, if at all, to the advocacy of the great orator but was effected by the deliberate efforts of the adherents of William Pitt in order to secure his political advantage.

The tone of the study is decidedly iconoclastic. This is especially true in his treatment of Edmund Burke. Speaking of the latter's forcing the breach between himself and Fox and thereby disrupting the Whig party, Mr. Laprade says, "There are two possible explanations of Burke's course on this question. One impeaches his moral the other his mental integrity" (p. 38). The first, the writer continues, is that the author of the *Reflections* had "deliberately decided to support the ministry, with the design of retrieving his political fortunes;" the second and "more favorable and probably more nearly correct" is that he was de-

luded with the belief that a considerable party in England desired to re-enact the scenes of the French Revolution in their own country, a belief which "Pitt, even when dealing with Burke, was not so hypocritical as to profess." While thus formally adhering to the more charitable explanation, Laprade's numerous arguments in support of the other indicate that he believes it to be at least partially the true one.

The character of Fox seems to receive more kindly consideration than any other. Many excuses are offered and numerous defenses attempted. But even here there is no hero-worship.

We would be slow to affirm that Fox was actuated by motives or employed methods that were on a higher plane than those of his eminent rival. * * * It may be that, if opportunity had offered, he would have hazarded public fortune to secure his private interest. But to his credit be it said that he did not do so. (p. 53.)

The following indicates the writer's opinion as to the influence of Dundas and Grenville:

Pitt now [1791] had a secretary of state for home affairs of whom he later said, "Every act of his is as much mine as his." If he had not been writing to Grenville he might with equal propriety at that time have affirmed the same thing of the new head of the foreign department. (p. 30.)

This is an interesting contrast to what E. D. Adams says in his *Influence of Grenville on Pitt's Foreign Policy, 1787-1798*, p. 3:

At least two of the members of the Cabinet, Dundas and Grenville, asserted their authority in their own departments, and were in consequence rather the fellow ministers of Pitt than his executive agents.

The most interesting feature of the monograph is the character of the sources used. No mention is made of secondary sources. The bibliography includes manuscripts; newspapers and periodicals; biography, correspondence, etc.; and pamphlets, tracts, etc. The last group occupies thirty-one of the thirty-six pages of bibliography.

The book is interestingly and, with a few unimportant exceptions, accurately written. Dealing with mooted questions, as it does, some exceptions are sure to be taken to its conclusions. From the facts selected the inferences seem to follow legitimately. But one cannot help feeling that in some cases other facts might have been chosen from the same sources in support of contrary opinions. The author appears to have made a sincere effort to be honest and impartial.

W. R. MANNING.

The Prerogative Right of Revoking Treaty Privileges to Alien Subjects.

By Thomas Hodgins, LL. D., Judge of the Exchequer Court in Admiralty, Canada. Toronto: The Carswell Co. 1909. pp. 27.

This is a reprint of an article originally published in *The Nineteenth Century and After*. It is a brief for the British side of the Newfoundland fishery controversy between Great Britain and the United States which will shortly be decided by the Hague Tribunal.

With all due deference to a Canadian Judge in Admiralty, the argument can hardly be considered successful. It is largely based upon a *tu quoque*, but the fact that the United States is a great sinner (and we contritely confess as much) does not absolve Great Britain or any other state from fulfilling her international obligations.

The theoretical support of the author's position is extremely weak. The main authorities cited are Vattel and Hautefeuille, although the author has also drawn upon Phillimore, Wheaton, Heffter, Halleck, Bluntschli, and Hall (the latter being the most recent publicist quoted).

These were certainly excellent authorities in their day, but it is about time that our Anglo-American lawyers and judges awake to a realization of the fact that the views of some of these writers are largely obsolete and no longer adequate, and that there are more recent publicists whose erudition is at least equally great and whose views are better adapted to the needs of our time.

In thus passing what may to some appear to be a severe judgment upon the juristic product of a neighbor with whom we should live upon terms of friendship and reciprocity, the reviewer is unconscious of the slightest degree of national bias.

AMOS S. HERSHEY.

La Seconde Conference de la Paix Réunie à La Haye en 1907. By Antonio S. De Bustamante y Sirven. Translated from the Spanish by Georges Scelle. Paris: J.-B. Sirey. 1909. pp. 765.

The JOURNAL is happy to announce that Señor Bustamante y Sirven's book on the Second Hague Conference, which originally appeared in Spanish, has been translated into French by M. Georges Scelle. The Spanish text was, upon its appearance, reviewed in the JOURNAL, Vol. II, page 973. It is, therefore, unnecessary to comment further upon the work, except to express satisfaction that it has been translated into French. Every account of the Hague Conferences performs a genuine service, inasmuch as it informs the public of the great and permanent results accomplished by the two conferences and tends to create public opinion for their continuance.

The People's Law. By Charles Sumner Lobingier. New York: The Macmillan Co. 1909.

As the title page indicates, this generous volume of over 400 pages is an historical study of the participation of the people in law-making, both constitutional and statutory law, from the ancient folk-moot to the modern referendum. It is a study in the evolution of democracy and of direct legislation.

Part I, "Genesis," investigates the origin and early development of the idea of popular participation in law-making, beginning with the archaic folk-moot of the Aryan peoples, and showing how this democratic idea was carried onward through the centuries finding its expression in the Teutonic folk-moot, the church covenants of the Reformation, and particularly in the Calvinistic theocracy, through which this idea was carried to England, there to revive and propagate, through the medium of ecclesiastical organization, popular participation in community affairs at a time when through the decline of the guilds democratic principles were being forsaken. That Calvinism exerted a more profound influence upon democracy in government in England than in other countries of Europe is attributed to the influence of the democratic guild organization which preceded its spread.

It was in this atmosphere, permeated with the spirit of guild life and infused with the democratic ideas which it fostered, surrounded by these venerable institutions which had formed almost the only school of the English people in self-government during the Middle Ages,

that the church was founded.

After showing how the idea of popular law-making was transplanted to America through the medium of the Puritans, the writer devotes two chapters to a study of popular ratification of public acts in the American colonies.

Part II, "Popular Constitution-Making in the United States," which comprises one-half of the volume, takes up the origin of the idea of constitution-making in the revolutionary era and its development during the first forty-five years of our national existence when but one-fourth of the State constitutions were actually voted upon by the people, to the present day when popular ratification has become general. A chapter on "Recapitulation and Results" presents an interesting summary of the previous discussion together with a brief analysis of the pros and cons of the initiative and referendum.

Part III, "Popular Law-Making in the United States," attempts within the limits of twenty pages to discuss the development of the idea of the statutory referendum as to particular measures and of the initiative and referendum as to any measures.

Part IV, "Popular Participation in Law-Making Outside of the United States," devotes a number of chapters to the development of this idea in France, Italy, other European countries, Latin-America, and Australia.

The real scientific value of this clearly written, carefully prepared, and laborious pioneer study, seems to lie in the wealth of historical data from original sources which has been compiled in logical fashion. It is a valuable contribution to the history of politics.

Its practical value for the construction of concrete political policies, it would seem, could probably have been much enhanced had more space been devoted to a discussion of the advantages and disadvantages of popular participation in constitutional and statutory law-making, and the presentation of more deductions of immediate practical value in the determination of the proper sphere of the initiative and referendum. Although a judicial and impartial study, the book represents a powerful historical argument in favor of the direct participation of the people in constitution and in law making.

In a scholarly introduction to the book, Prof. George Elliott Howard, to whom the volume is also dedicated, says:

His monograph rests upon a wealth of source materials never before thoroughly explored. He has enabled the student securely to follow the evolution of the written constitution in the colonial and revolutionary periods and in the individual States during the century and a quarter of our national existence. * * * The author has enriched our historical literature with an illuminative treatise which will prove of great service to every student of political science and jurisprudence.

ERNST C. MEYER.

International Law. By George Grafton Wilson, Ph. D., Professor in Brown University, and George Fox Tucker, Ph. D., lately reporter of decisions of the Supreme Judicial Court of Massachusetts. 5th ed. New York: Silver, Burdett and Company. 1910. pp. xix, 505.

The new edition of this well-known text-book contains so many changes and so much new material that it deserves more than a passing notice. The authors have made little change in the general classification and

arrangement of material, having already attained a remarkable degree of success in this respect. There system is logical and worked out with great care.

The tremendous development of international law since the call for the first Hague Conference in 1898 has rendered large parts of existing text-books obsolete. Many of the so-called revised editions are not real revisions at all. Such can not be said of the volume before us. It embodies the results of the two Hague Conferences and of the London Naval Conference of 1909 as well as other new material. The reader may be inclined at first sight to criticise the adoption in the text of so many provisions from recent conventions, the status of which is still a matter of uncertainty, but a closer examination will show that the authors have put in the text only those provisions on which the powers are practically agreed. The fact that Dr. Wilson was one of the American delegates to the London Conference has enabled him to speak with special authority on all matters relating to the commerce of neutrals.

The volume is designed as a practical text-book for the average college or law school course in international law. It is necessarily brief and omits altogether some topics to be found in the larger treatises, but it covers the essential points. It is clear, logical, well proportioned, accurate, and fully abreast of the times. These qualities should appeal to the general reader as well as to the student, and there is probably no book of like compass which gives so comprehensive a view of the subject. There are fifteen appendices, containing the texts of recent conventions and other interesting matter.

JOHN HOLLADAY LATANÉ.

PERIODICAL LITERATURE OF INTERNATIONAL LAW

(For list of abbreviations used, see Chronicle of International Events, p. 704.)

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W. CLAYTON CARPENTER.

THE FOURTH INTERNATIONAL CONFERENCE OF AMERICAN REPUBLICS

The International Conference of American Republics has assumed a well-defined and dignified position among the great international organizations of the world. Four conferences have met up to the present time. The suspicions and misrepresentations by which the first of these meetings were surrounded, while still occasionally cropping up in the press and among persons who are not entirely well informed, are no longer of any effect among serious publicists. As the general character of the International Union becomes more and more established, many matters that originally led to heated discussion may now be taken for granted and left to a purely academic forum. The work of the conferences of the Union has become specific and definite, its usefulness can no longer be questioned, when it has come to form the main basis of treaty relations and of administrative arrangements among the American republics. But these specific achievements in the development of international law do not exhaust the mission of the Pan-American conferences. They are assisting in the creation of that common mind, that harmonious public opinion, the existence of which will make it possible for America to play in the history of the future that part which accords with the resources and the natural conditions of her countries. The mere fact that twenty-one nations differing from each other in customs and traditions as widely as does Brazil from Mexico or the United States from Paraguay, can meet together in a harmonious body and, realizing a common destiny imposed by natural conditions and a common historic development, set to work to solve specific problems in a practical sense — this fact alone is a proof that the Pan-American Union has not been established in vain.

The Fourth International Conference met at Buenos Aires on July 12 under the honorary presidency of the Secretaries of State of the United States and of Argentina, Mr. Philander C. Knox, and Doctor Victorino de la Plaza; and under the active presidency of

Dr. Antonio Bermejo, the Chief Justice of the Supreme Court of Argentina; with the Argentinian Minister in Washington, Señor Epifanio Portela, acting as Secretary General. As the year of the Conference coincides with that of the celebration of the centenary of independence in most of the Spanish American countries, the Conference will stand in history as the most notable feature of this commemoration; especially as it gives proof of the fact that the nations of this continent, moved by a common impulse to establish their independence, are still, after a century has passed, acting upon the basis of a common American policy. It is not, however, our purpose in this article to give an account of the sessions of the Conference or of the celebrations which accompanied these meetings, interesting though this may be, but to deal more specifically with the action of the Conference as affecting or involving international law principles or as creating new administrative arrangements.

In accordance with the precedent established at the Conference of Rio de Janeiro, the work of the Conference was based entirely upon a program previously adopted by the Governing Board of the Pan-American Union in Washington and accepted by the Governments composing the Union. A preliminary program which had been issued about six months before the meeting of the Conference contained a number of subjects which were ultimately omitted by the Governing Board for reasons of convenience and out of deference to the wishes expressed by one or the other American government. The preliminary program is nevertheless interesting as embodying subjects which may be taken up in future discussions. The Governing Board also adopted the rules and regulations which governed the Conference. These rules followed in the main, and in almost every detail, those which had been in force at the Conference of Rio de Janeiro. The provision that the sessions of the Conference were to be secret was, however, omitted, it being left to the Conference itself to determine the matter of admission to its sessions. The rules fixed the number of countries to be represented on the various committees, but the actual number of these committees was settled by the Conference itself; there being altogether fourteen committees, on six of which every delegation was represented.

The most notable regulation is that which provides that subjects not included in the program shall not be introduced unless there be a favorable vote of two-thirds of the members. This regulation, in connection with the character of the functions of the Committee on General Welfare, brought about some discussion. There was, however, an almost unanimous feeling among the delegations that it was not desirable that entirely new business should be introduced at all. A country wishing to bring before the Conference any subject may do so by proposing its discussion and asking for its inclusion in the program. As international conferences are not composed of legislators acting to a certain extent *sua juris*, but of delegates ruled by the instructions of their governments, it is not only desirable, but absolutely necessary that the program of subjects to be discussed should be known beforehand by all the governments, in order that they may study them and give instructions thereon to their representatives. This principle affects the functions of the committee which according to the regulation is to deal with the "general welfare." The nature of these functions has not been entirely clear. Is it to deal only with the immediate welfare of the Conference and its members themselves, taking up questions which affect the convenience of the Conference? Or, going to the other extreme, is it to consider and report upon general business bearing upon the welfare of the entire continent? Accepting the latter view, a delegate of Paraguay argued that every country ought to be represented on this committee, considering that by common accord the congress might modify its program and take up some new subject interesting to all American countries. Later on, another delegate spoke at length upon the desirability of having such a committee which would deal with the broader aspects of American policies. He cited an expression used by Sr. Nabuco in the Conference of 1906 when he spoke of the "committee on the general welfare of the continent," and said that "to it pertain all the measures and plans not dealt with in the program and all ideas of a unanimous character, so to speak, advanced in the interest of our hemisphere." In that conference Sr. Nabuco also said that "the committee on the continental welfare looks after everything not foreseen in regard to the good relations between the Ameri-

can countries." It is evident that whatever interpretation may be given to the character of this committee, its functions will in the nature of things be more restricted than the name implies. The general welfare of the continent is indeed the subject which the Conference deals with, but it is necessary that the governments should know beforehand what aspects of the general welfare are to be considered, in order that they might form a definite opinion thereon. The aspects so selected will be embodied in the program, and their consideration will be divided among the different committees of the Conference. It is unlikely that a Conference will ever vote the taking up of an entirely new topic which has not been considered by the governments, unless such topic be of very minor importance. Matters of a relatively unimportant nature may from time to time be referred to the general welfare committee, if admitted by a two-thirds vote in the Conference; but it is not in accordance with the character and the practice of the International Union to bestow upon such a committee the function of introducing of its own motion matters which it might deem of general interest, nor was such a practice at all in the mind of Sr. Nabuco when he made the statements cited above. Whenever the question arises as to whether a certain motion constitutes new business, it is proper and in accordance with practice that the question be submitted first to the committee on rules and regulations. Only in cases where there is no doubt as to the subject-matter being included in the terms of the program, but where no special committee has been provided for it, should such business be directly referred to the Committee on General Welfare; unless indeed the introduction of some new matter has been expressly sanctioned by a two-thirds vote. The proper time for the governments to consider what aspects and features of the general welfare of the continent they desire to have discussed, is the period when the program for the Conference is being formed by the Governing Board of the Pan-American Union.

In connection with the Fourth Conference some very interesting questions arose as to the rights of a nation which flow from membership in the Union. As the relations between the Governments of Argentina and Bolivia were temporarily strained at the time when the

invitations for the Conference were being issued, the question arose as to whether a country which has broken off its diplomatic relations with the government which is to act as the host of the Conference, is, nevertheless, by virtue of its membership, entitled to send a delegation. This question was resolved in the affirmative, and, through the intermediation of the Governing Board of the Pan-American Union, an invitation was extended to Bolivia to send representatives to the Conference. The plenary rights of membership at all times and under all conditions were thus established, although in this particular case Bolivia ultimately failed to avail herself of her right to take part in the deliberations. A similar problem arose with respect to the representation upon the Governing Board of the Union, of a government which for the time being does not have a diplomatic representative in Washington. It was decided that a republic thus situated might entrust its representation on the Governing Board to some other member of that body who would then have a vote for each country represented. The suggestion had been brought forward that an American republic whose diplomatic relations with the United States had been interrupted should be entitled to accredit a special representative directly to the Governing Board of the Pan-American Union. When the practical difficulties involved in such an arrangement were pointed out, especially the inadmissibility of erecting within a sovereign state a separate organization empowered to receive *quasi*-diplomatic envoys,¹ the suggestion was withdrawn, and the solution above outlined was unanimously adopted.

An interesting question in the public law of international unions is that concerning the effect of the admission of delegates of a government, the independence or legality of which has not been recognized by all the members of the Union. Precedents have been established which appear to justify the enunciation of the principle, which is also in accordance with the essential nature of international unions, that membership in a union and participation in its administrative and deliberative business does not involve the recognition, by every state participating, of the legality or independence of every other

¹ The right of legation enjoyed by the Vatican rests on a different basis.

government represented. The delegates of the Republic of Brazil participated in the First Pan-American Conference at a time when the republican government had not as yet been officially recognized by all the American states. At the Third Conference, both Colombia and Panama were represented, the latter republic at that time not having been recognized by the country from which it had severed itself. The delegates of Colombia did not make any declaration respecting this matter while the Conference was in session, yet no one considered their participation as implying a recognition of the new republic. Similarly at the Fourth Conference, the presence of the delegate from Nicaragua who represented the government of Sr. Madriz, which was not recognized by the United States, was not a fact implying such a recognition. It is evident that as the Conference from its very nature can not enter into the controversies between individual nations, nor those within the different countries, its acceptance of the representatives of a *de facto* government can not be said to involve universal recognition. It is indeed conceivable, though fortunately such a case has not as yet arisen, that the Conference may have to decide for itself whether to recognize, for its own purposes, a certain government desiring to be represented. This question would arise should two delegations from one country present themselves, or should the delegation appearing from any country notoriously not represent a *de facto* government. It is, however, very likely that in such a case the decision would rest upon the principle that as the Conference can not go into the internal affairs of a country, it can not admit any delegation at all under such circumstances; unless indeed in the former of the two cases one of the two delegations appeared under practically fraudulent pretences. The full enjoyment of the rights of membership in the Union may therefore be said to be based upon the maintenance of a stable and undivided government.

A step was taken to secure the periodicity of future conferences by following the precedent established at Rio de Janeiro, by bestowing upon the Governing Board of the Pan-American Union the power to designate the place and time of the next Conference and by fixing as the period within which it is to be convoked the period of five

years. This time may, however, be extended, should a meeting within the designated period become impossible. The rivalry which always exists among various nations who wish to secure the privilege of inviting the Conference is in itself a proof of its importance. In order to avoid lengthy discussions and unavoidable disappointments during the Conference, it has been found convenient to allow the Governing Board to make the selection with due regard to all the points of convenience and propriety involved.

The Conference by resolution recommended the establishment, in the City of Buenos Aires, of a permanent Pan-American exposition of products. In order to carry out this resolution, it was provided that, upon analogy to the Governing Board of the Pan-American Union, the American diplomatic representatives accredited to the Argentine Government, should form a committee in Buenos Aires entrusted with the administrative direction of the permanent exhibit.

The organization of the Pan-American Union itself was a subject for detailed and careful consideration in committee, as the result of which a resolution and the tentative draft of a treaty were adopted by the Conference. The Committee on the Bureau of American Republics considered the advisability of converting into a formal convention the resolution passed and continued by successive Conferences under which that institution has hitherto been maintained. On the part of many delegates the belief was expressed that the ratification of such a convention would require an indefinite time on account of the constitutional provisions in numerous republics which require the consent of Congress. It was felt that the activities of the Bureau might be embarrassed were a convention adopted immediately, on account of the delays which might occur in its ratification. It was therefore decided to maintain for the immediate future the resolution under which the Bureau exists, making therein such changes as might seem necessary; and also to submit to the governments the draft of a convention carefully considered by the Conference, which can be ratified as soon as the governments may find it convenient.

The Conference maintained the presidency of the Secretary of State of the United States of America in the Governing Board of the Pan-American Union. Indications had been made by the dele-

gates of some countries that it would be more in accordance with the equal dignity of all the members in the Union if the chairmanship of the Board were made elective. But it was pointed out that by the common practice of international unions a position of similar dignity is usually accorded the Minister of Foreign Affairs of the country in which the Union has its seat; and also that the presidency of the Secretary of State would powerfully assist the Union and help to increase its dignity and efficiency. The importance of these considerations was accepted by all, and the dignity of the presidential office was again conferred upon the Secretary of State of the United States, as an honor freely bestowed by the American nations. In the absence of the Secretary of State, the sessions of the Governing Board are to be presided over by one of the American diplomatic representatives present in the order of rank and seniority, and with the title of vice-president. In order to acknowledge the dignity which it is proper to recognize in an international institution of such importance, the name of the Bureau was changed to "Pan-American Union;" while the name of the organization of American countries which supports the Bureau was changed to the briefer form of "Union of American Republics."

Under a resolution passed at Rio de Janeiro in 1906, Pan-American committees have been established in nearly all of the republics. It was the original intention that these bodies should cooperate with the central Union in carrying out its work. In accordance with this purpose and in order to make it more definite, the Fourth Conference embodied in the resolution and draft-convention relating to the Pan-American Union an article defining the functions and relations of the Pan-American committees. Being linked to the Pan-American Union they are to form with it a common organism, acting as its representatives and agencies in the different states, and having on their part the right to bring to the central institution matters relating to their respective countries.

The functions of the Pan-American Union were not essentially modified. It was decided that it would be desirable for the Union to gather and publish information on the current legislative acts of the American Republics. The position of the Union as the perma-

ment commission or agent of the International American Conferences was emphasized. The success of these Conferences in the future will depend largely upon the thorough and systematic work of preparation carried on by the Pan-American Union and the committees. The questions considered by the Conferences are becoming less general and elementary, far more detailed and technical. The extensive body of accurate information required in the making of treaties and resolutions which shall be of practical value, can be furnished only by cooperative work carried on through the administrative agencies of the Union. The financial administration was more definitely regulated with respect to the annual budget and the duty of the member-states to pay their quota upon a fixed date into the treasury of the Pan-American Union. It was left to the Governing Board to arrange for the fulfillment of the duties of a treasurer on the part of some official of the Union, and to establish an independent system of audit. The importance of the Columbus Memorial Library as a center where the most complete information on all the countries of the Union can be obtained was recognized, and the Republics renewed their engagements to supply this collection with documents and other books. In order to make the work of the Pan-American committees more successful, and to form in each country a center of information on all the others, it was also provided that documents and books should similarly be sent to the Pan-American committees in each country. It was felt that it would not be wise to attempt to make specific regulations for all the activities of the Pan-American Union. The power to provide in this manner for the control of the administration in all its agencies was therefore left to the Governing Board, and, in matters referring to the internal administration, to the Director General. The Pan-American Union thus established is an organization of great importance and dignity. It was therefore thought proper that the title of the head official should be changed to "Director-General," and that of the Secretary to "Assistant-Director."

In preparing and adopting the draft of a convention concerning the Pan-American Union, the Committee and Conference were governed by the principle that in such a convention there should be laid

down only the essential bases of the organization and functions of the Union, leaving to the Governing Board and to the Director-General the power to determine, by means of regulations, all the details involved in the proper performance of the mission of this important agency. The draft adopted rests entirely upon experience and incorporates in a more formal manner the organization already developed by means of the successive resolutions of the conferences and the activities of the Union. The draft-convention on the Pan-American Union is in a form ready for action by the governments of the various American Republics.

The program of the Conference included the consideration of the renewal of the treaty concerning the arbitration of pecuniary claims. The treaty concluded in Mexico upon this subject,² and renewed at the Conference at Rio in 1906, had been ratified by eight American states. The convention adopted by the Fourth Conference retains the first article of the treaty of Mexico, which provides for the submission to arbitration of all pecuniary claims which can not be adjusted amicably through diplomacy, in all cases where such claims are sufficiently large to warrant the expense of arbitration. To this article there was added the clause that "The decision shall be given in conformity to the principles of international law." The treaty allows the alternative of submitting the respective claim to the Permanent Court of Arbitration at The Hague or to constitute a special jurisdiction. While the former treaties were concluded for a period of six years, the time during which the present convention is to run is indefinite, the signatory nations being given the faculty of denouncing the convention upon giving notice, two years in advance, of such denunciation.

The discussion in committee, of the treaty on pecuniary claims, was very interesting from the juristic point of view. The proposal was made to include in the treaty a provision giving the arbitral tribunal the power to decide as a preliminary question whether or not the claim is one in which diplomatic procedure is appropriate. The suggestion was made in order to protect the sovereignty of a nation

² SUPPLEMENT, 1:303.

against any attempt to take from its courts cases which they are legally competent to try, and to carry them before an international judicature. While the article in question was not added to the treaty, the committee in its report cited an extract taken from the report of the committee at the Rio Conference to the effect that The internal sovereignty of a state consists explicitly in the right it always preserves of regulating such juridical acts as are consummated within its territory, by its laws, and of trying these by its tribunals, excepting in cases where, for special reasons, they are converted into questions of an international character.

The committee then disavowed the purpose of withdrawing alien residents from the jurisdiction of the local court, and states that arbitration will exist only

in cases where it is shown that there has been a violation of the rules of conduct imposed upon states under the sanction of international law, towards the citizens of other nationalities. * * * With this understanding, the expression "denial of justice" should be given a most liberal construction, causing it to embrace all cases where a state fails to furnish the guarantees which it ought to secure to all individual rights. The failure of guarantees does not come solely from the judicial acts of a state. It may result also from the acts or omissions of other public officials.

In the course of the discussion, Mr. John Bassett Moore, delegate of the United States, made the following declaration which was also incorporated in the report of the committee, and which indicates clearly the points involved:

The undersigned, while he refrains from entering into a discussion of the statements of general principles embodied in the foregoing report, deems it proper to observe that he does not consider it to be practicable to lay down in advance precise and unyielding formulas by which the question of a denial of justice may in every instance be determined. Still less does he believe it to be possible to treat this matter as a preliminary question, which may be decided apart from the merits of the case, or to include in a general treaty of arbitration a clause to that effect. In the multitude of cases that have, during the past hundred and twenty years, been disposed of by international arbitration, the question of a denial of justice has arisen in many and in various forms that could not have been foreseen; nor can human intelligence forecast the forms in which it may arise hereafter. In the future, as in the past, this question will be disposed of by the amicable methods of diplomacy and arbitration, and in a spirit of mutual respect and conciliation which happily grow stronger among nations with the lapse of years.

This declaration was embodied in the committee's report because the other members did not consider it to be in conflict with what had been set forth.

A group of three treaties adopted by the Fourth Conference deals with the important subjects of copyrights, patents of inventions, and trademarks. In all these matters the Conference was informed and inspired by the recent advances in the development of international administrative law, achieved through the general international Union, which deals with industrial and literary property. The treaty of Berne, as recently amended by the convention of Berlin, formed the basis of the convention on literary and artistic property. The essence of this convention is contained in Article 3 which provides that

the recognition of a right of literary property obtained in one state, in conformity with its laws, shall be of full effect in all the others, without the necessity of fulfilling any further formality, whenever there appears in the work some statement indicating the reservation of the property right.

The principle here adopted constitutes the highest and most effective form that can be given to literary property. In fact it assimilates that right almost completely to property in physical objects, which too is protected in every civilized state whenever it has been legally acquired in one of them. The provision led to some debate in the Conference as certain delegates, especially some members of the Mexican delegation, considered that more formalities should be required than merely those exacted by the state of origin, but the simpler system was ultimately adopted by the Conference. Article 6 of the convention provides that the protection granted to authors or their representatives shall be governed by the laws of the country where it is sought, that, however, the term of protection shall never exceed the time accorded by the laws of the country in which the respective property right originated. This article embodies the solution adopted by the most recent and mature opinion of jurists the world over and incorporated in the convention of Berlin. The result of the provision is that each country gives to the literary property originating in other treaty states the same protection which it accords to its own citizens; but that, on the other hand, no country can claim

for its citizens a longer term of protection than is granted by its own legislation.

In the treaty on patents of inventions the recent thought and experience of the entire world were also taken into account. The essence of the convention is contained in Article 2, which provides that:

Every citizen of each of the signatory states shall enjoy in each of the other states all the advantages conceded by their respective laws relative to patents of invention, designs and industrial models. In consequence, they shall have the same protection and legal remedies against every attack upon their rights, being bound, however, to comply with the formalities and conditions imposed by the internal legislation of each state.

It is further agreed that every person who has duly applied for a patent, in one of the contracting states, shall be protected in his right of property during a term of twelve months in order that he may have time to secure recognition of his patent in the other states. Another article provides that the recognition of a patent may be refused because the process or model involved does not really constitute a new invention, but has been in use previously. This provision is important as it will oblige states, in order to receive international protection for the patents granted by them, to inquire into the usefulness and novelty of the inventions for which a property right is sought. The absence of a provision of this kind from the convention adopted by the Conference of Rio de Janeiro was one of the causes why the Government of the United States decided not to ratify that agreement.

A detailed and interesting convention was adopted concerning trademarks. Full international protection is to be accorded to trademarks duly registered in one of the countries of the Union, without prejudice to the rights of third persons or to the provisions of the internal legislation of each state. For the purpose of carrying out this system an international registry of trademarks is to be established, with two bureaus, one located at Havana, the other in Rio de Janeiro. In order to secure the benefit of international protection, the owner of a trademark may register it in the respective bureau, upon the payment of the sum of fifty dollars. In the conventions

adopted at Rio de Janeiro, it was contemplated that the international Bureaus of Havana and of Rio de Janeiro should not only undertake the registry of trademarks, but should also be the depositories of international patents and copyrights. Upon more careful consideration it has, however, seemed unduly cumbersome and expensive to require the transmission of the records of all patents and copyrights granted in the individual states. The system adopted at Buenos Aires therefore confined the function of registry entirely to trademarks, while it entrusted to the bureaus the function of acting as general information offices also in relation to intellectual and industrial property. The reasoning of this decision accords with the experience of the International Union which has its seat at Berne. As is well known, the Bureau at Berne acts as a registry only for trademarks; in matters of patents and copyrights it is an information office as well as the general agent of the International Union. The privilege which international legislation has been attempting to secure for these latter two kinds of property is that each state could give to the citizens of other states the rights and the protection which it accords to its own citizens. An international registry of patents and copyrights has not as yet been created anywhere. It is, however, the purpose of international agreements to render more and more effective and uniform the protection which the different states accord to these rights. In this matter many of the American states have made but a mere beginning, and it is highly desirable, from the point of view of the development of intellectual and industrial life, that there should be in those states which have not as yet an efficient legislation, a strong movement toward protecting these important kinds of property.

Matters of great interest in international administration were dealt with in the resolutions concerning the unification of consular documents and customs regulations. The instructions issued by the Department of State to the United States Delegation dwelt upon the hinderances of trade which result from the lack of uniformity in such matters as consular fees, the forms of invoices and manifests, and other features of consular and customs administration. It suggested the adoption of a uniform invoice for all shipments from one

republic to another and a uniform method of consular certification. The recommendations embodied in the resolution include the following: to suppress the consular certification of the general manifest; to dispense with the certification of the bill of lading in the case of countries requiring the certified consular invoice, for the reason that the latter document embraces all material data; and to adopt a common form of consular invoice and of consular manifest, forms of which were appended to the resolution. The study of the different forms of certificates required convinced the committee and the conference, that

the essential requirements of all these documents could be combined into a single international form of consular invoice, if there were omitted the certificates of shippers and consuls which must reflect the requirements of local laws.³

With respect to consular fees the resolution recommended that they should be moderate and should not be treated as an indirect means of increasing the customs revenue; it is considered desirable that these fees should be limited to an amount necessary to cover the costs of the consular service.

The resolution regarding customs regulations is in the main a re-statement of the resolutions adopted by the New York International Customs Congress of 1902, which had never been placed before the several countries in a formal way. These resolutions contain a number of suggestions for making the formalities of customs administration simple, and freeing them from elements which would unduly retard the activities of commerce in the shipping industry.

The resolution adopted on the subject-matter of sanitary police recommends the adoption by the countries which have not yet ratified it, of the international Sanitary Convention of Washington,⁴ as well as the enforcement of the resolutions of the Third and Fourth Sanitary Conferences, held respectively at the City of Mexico and at San José in Costa Rica. Article IX of the Convention of Washington is to be given the interpretation that the official proof of free-

³ From the report of the Delegation of the United States, to the Department of State.

⁴ SUPPLEMENT, 3:237.

dom from infectious disease must be "satisfactory to both parties interested." The original proposal that such official proof should be "satisfactory to the interested party" was in committee objected to by certain delegates on the ground that this phrase might endanger the commerce of the weaker country by subjecting it to the discretion of the officials in another who might use their power in a hostile manner. The form ultimately adopted seemed to be free from the objection raised in the opinion of all the delegations, with the exception of that of Venezuela which entered its reservations upon this point.

The other resolutions adopted by the Conference deal either with matters of condolence or commemoration or take up commercial and intellectual interests, such as the construction of the Pan-American Railway, the establishment of more efficient steamship service between the American republics, the summoning of the Coffee Congress, the celebration of the opening of the Panama Canal, the interchange of university professors and students, and the appreciation of the Pan-American Scientific Congress. All these matters are full of interest and form an important part in the development of closer relations between the republics of America, but as they do not involve any specific points in international law or practice, we shall simply mention them here without dealing with them in detail. It may, however, be noted that the resolution concerning steamship communication contains the very interesting suggestion that an inquiry be instituted concerning the means by which there may be established between the American republics a reciprocal liberty with respect to the coasting trade. The resolutions referred to in this paragraph indicate the growing strength of the feeling of solidarity among the American nations, which was given an eloquent expression in the speeches delivered at the opening and at the closing of the Conference, as well as in the sessions when the centenaries of independence of different republics were commemorated.

Concerning the methods of work of the Conference it may be said that though the period during which it met was short and much of the time was occupied by various festivities and other social engagements, the delegates in the various committees devoted themselves

to their tasks with great interest and devotion. There was a complete feeling of mutual confidence, and all the questions before the committees were discussed with great frankness and in the fullest detail. Every point of view was ably presented, and differences of opinion were insisted upon with energy. It is therefore the more gratifying to record that, with all such divergencies, and after all national points of view had been discussed without reserve, it was possible to arrive at a practically unanimous agreement upon every subject of the program. Nor were these agreements the result of superior insistence on the one part or the ready acceptance of alien points of view on the other, but they naturally grew and evolved out of the discussion so that as it proceeded certain definite conclusions came more and more clearly, and always naturally out, of the chaos of uncertainty into the steady light of rational conviction.

The Fourth International Conference will be remembered for the practical spirit in which it undertook and completed its work. To those who took part in it, it will always be memorable and grateful on account of the feeling of mutual confidence and understanding of the companionable intercourse and of the true friendship which reigned among all the members. Through these personal relationships, the nations themselves are strongly drawn together, misunderstandings are avoided, and a sane and rational international policy is strengthened.

PAUL S. REINSCH.

THE ABOLITION OF SLAVERY IN THE CHINESE EMPIRE

The recent Imperial rescript of the Chinese Government abolishing slavery within the empire is a document of unusual interest,¹ and adds one more to the many evidences that have been given lately of great changes going on among this ancient people. The far-reaching effects of this reform can hardly be estimated at present, but the proclamation of emancipation which is to be posted far and wide throughout the empire will be a charter of liberty to myriads of the down-trodden and oppressed, and will mark for them the upward turning of the way toward freedom and enlightenment.

The rescript, which was issued on January 31, 1910, and published on February 19 last, was called out by a memorial of the late Chou Fu, Viceroy at Nanking, submitted to the Throne by him so long ago as March 25, 1906.

The tender-hearted old Viceroy did not live to see the fulfillment of his hopes, for he has been dead some two years, but the cause which he espoused found the support of one Wu Wei-ping, a Censor, who, on February 6, 1909, presented another memorial praying that the blessings of liberty might be bestowed without further delay upon those who had won the compassion of Chou Fu.

No Chinese memorial neglects an opportunity to hark back to antiquity and find in the virtuous practices of the ancients a precedent for that which is recommended. Therefore the aged Viceroy began his argument in favor of the abolition of slavery by declaring that

in the prosperous times of the Three Ancient Dynasties (B. C. 2205 to B. C. 255) the buying and selling of human beings was unknown, though criminals were punished by being reduced to slavery. It was during the decline of the house of Chou that the first talk of selling men and women was heard, and during the succeeding dynasties of Ch'in and Han (B. C. 255 to A. D. 264) the practice became established.

¹ Printed in SUPPLEMENT, p. 359.

He referred to the many edicts already issued by the present Manchu Dynasty in favor of the enslaved, some of which are quite noteworthy, and pointed to the abolition of slavery by European and American nations as an example to be imitated. "Great Britain," he said, "spent some tens of millions (of taels) in freeing the slaves in that empire, and although the United States issued a proclamation emancipating the slaves in America, it was only after years of civil war that liberty was at last secured for them."

He reminded the Throne that foreign nations look upon those that tolerate slavery as barbarous peoples. Western nations, he said join in hunting men that buy and sell human beings and punish them, thereby exhibiting a love of humanity and bringing the whole earth to recognize as a binding international law the obligation to protect men in the enjoyment of liberty.

He pointed out, too, that slavery was inconsistent with the programme of reform now being carried on by the Government, and he prayed, therefore, for the prohibition of the traffic in human beings and the emancipation of those already held in slavery.

The recommendations of Chou Fu and those of the Censor Wu Wei-ping were referred to the joint consideration of the Commission on Constitutional Government and of that having charge of the revision of the Code, and the report of this joint commission has been approved by an Imperial rescript and has now become the law of the empire.

To understand the report upon which the rescript is based it is necessary to know that in the old Code now undergoing revision the status of every subject of the Emperor is carefully defined, and that all attempts of those belonging to the lower orders to improve their condition are, in theory at least, most emphatically discouraged. I say "in theory," because in reality the law has long been a dead letter, and thousands have raised themselves from menial positions to more honorable status.

Briefly, the inhabitants of the empire are divided into four great classes: banner-men, free Chinese subjects, out-castes, and slaves. To these may be added those belonging to the wild tribes of indigenes inhabiting the mountains of the south and west, who are governed through their chiefs, and who need not be considered here.

The law provides for the careful classification and enrollment of the population, and severe penalties are prescribed for those who by false enrollment endeavor to lighten the services required of them.

The banner-men include the families of those Manchus, Mongols, and Chinese who effected the conquest that placed the present Manchu Dynasty upon the Throne in 1644 A. D. These families are divided into twenty-four corps, or banners, there being eight of each of the three nationalities.

These banner-men enjoy special privileges. They are all pensioners, men, women, and children. The males are required to bear arms and forbidden to engage in trade. Until 1901 they were forbidden to intermarry with Chinese other than banner-men, and until 1905 were subject to the jurisdiction only of Manchu magistrates and Manchu law. Many efforts have been made since the "Boxer" troubles to remove all distinctions between banner-men and ordinary Chinese subjects. The marriage restrictions have been abolished and both races placed under one code, but thus far the opposition to the abolition of pensions has been too strong to be overcome.

The free Chinese make up the great mass of the inhabitants; the farmers, artisans, and merchants, as well as the majority of the gentry and officials. The highest stations under the Throne are open to them, and many commoners, like the late Li Hung-chang, have advanced themselves by their services and abilities to high rank in the nobility and to great influence in the state.

But there are some classes of Chinese subjects whose degradation or menial occupations have made them out-castes and subjected them to certain disabilities. Among these are the actors, beggars, lictors, prostitutes, and those engaged in personal service, such as the barbers and chair-bearers. Efforts have been made by imperial edict at various times to improve the condition of some of these classes, particularly the actors, beggars, lictors, and prostitutes, by encouraging them to abandon evil callings and to engage in more honorable pursuits. Another group of out-castes are known as the *to min*, a degraded class in the Province of Chekiang, whose origin is hidden in obscurity. They are generally believed to be descendants of men

engaged in rebellion some centuries ago. Their disabilities were removed by Imperial edict in 1903, and the Censor, Wu Wei-ping, in his memorial refers to the fact that schools have been established among them and that their condition has greatly improved. Under the old law all these various degraded classes were forbidden to enter the examinations or hold office until three generations after abandoning their dishonorable callings, and they still suffer civil disabilities to the extent of being deprived of the suffrage in the elections for the provincial assemblies established under the new scheme of representative government. In the third generation they were permitted by the old code to compete at the examinations and to hold offices of certain grades. In practice, however, the prohibition mentioned has often been evaded by the adoption of the ambitious candidate into some respectable family.

Slavery as it exists in China to-day is an inheritance from a very ancient past, and its abolition is attended with many difficulties, as is the case, indeed, with the removal of any long established social custom. A Chinese proverb says, "Old customs may not be broken." Vested interests in all lands are arrayed against reform, and in this respect China is no exception to the rule. While the sentiments of Chou Fu and Wu Wei-ping, therefore, are heartily approved by the joint commission, the practical measures, recommended and adopted, stop short of the entire abolition of slavery and are manifestly but a compromise, a compromise made necessary by the opposition of the Manchu nobles.

The report of the commission mentions three difficulties in the way of complete emancipation. The first has to do with the *pao-i*, certain retainers of the Manchu princes, with whose services the latter are unwilling to part. The second concerns the serfs and slaves of Manchu and Mongol nobles and officials, and the third grows out of the almost universal demand for female slaves for domestic purposes.

The *pao-i* are bond-men who are descendants of those retainers of the princes in mediæval times — some of them from Tartar tribes, some originally Corean, and others perhaps of Chinese origin — who formed an important constituent of the military strength of the

Manchus, being a subordinate but efficient body of troopers within each of the Eight Banners when these war-like forces were subduing Manchuria and later when they over-ran and conquered the empire of China. These bond-men occupy a position midway between the free and the slave. They are bound to render suit and service to their lords, but, on the other hand, they are admitted to the examinations — or were so admitted so long as the old system of examinations was in existence — and are eligible to certain offices. It is worthy of note that the office of Hoppo, or Superintendent of Customs, at Canton, until that office was abolished in 1904, was uniformly held by one of these *pao-i*, and there are other posts which at times have been held by bond-men, who have obtained these favors through the influence of their patrons.

It is pointed out by the joint commission, as a sort of apology for not releasing these bond-men from their service, that they were never slaves in the ordinary sense, as is shown not only by their eligibility to office, but by the penal code, which accords them the same protection and subjects them to the same punishments as subordinate employees in the public service. What their status will be under the revised code is not made clear; the commission merely observes that since slavery is abolished their condition too must be improved, and that the old law can not be rigidly enforced against them.

With respect to the household slaves and the serfs of the Manchu and Mongol nobles and officials we are told that such slavery has originated in three ways: by gift, by self-surrender or "commendation," and by purchase under written deeds. Of those obtained by gift some are probably descendants of captives taken in war. The enslavement of such captives was, of course, the universal practice of the ancient world, and was, indeed, at its introduction a humane measure, since it superseded the custom of universal slaughter observed in earlier and more savage ages. It was thus a forward step in the progress of mankind and aided materially in the industrial development of the race.

In this connection it is worthy of note that the manual of the Chinese Board of Rites still contains a regulation, though in practice it has now become obsolete, which provides that captives taken

in war shall be sent to Peking, and upon a chosen day shall be led with ropes about their necks to the Temple of Imperial Ancestors and made to kotow before the tablets of the former rulers of the present dynasty, that upon another day they shall similarly be presented at the Altar of the Guardian Spirits of the Realm, and that upon the following day they shall be led in chains before the Emperor, who may either order their execution, or, if mercifully inclined, spare their lives and enslave them.

Others of these slaves are criminals condemned to life-long servitude as a punishment for offenses committed, and some are either descendants of such criminals or relatives of others who have been put to death for heinous crimes, such as high treason. Until 1905 the law required the wives and unmarried daughters of such criminals to be given in slavery to the families of deserving officials, and their sons, if under sixteen, to be made eunuchs and enslaved. If over sixteen years of age, sons and other male relatives were executed if they had guilty knowledge of the crime, and, if otherwise, were also made eunuchs and given as slaves to meritorious officials.

Besides the enslaved descendants of captives and relatives of criminals, there are certain serfs attached to the lands which were voluntarily surrendered by their ancestors at the time of the Manchu conquest in return for protection, in much the same way as was done in the Middle Ages in Europe, a practice there known as "commendation." These serfs cultivate the lands owned by their forbears, but pay a certain proportion of the produce to their protectors, and are free from further taxation. They have no liberty of movement, however, but are bound to the soil and may not abandon it. The old code expressly forbids their admission to the examinations. The number of such serfs in China is not so large as is sometimes estimated. The statement that the great majority of agricultural laborers in China are slaves is far from the truth. In fact, except in the vicinity of Peking and in the Manchurian provinces, such serfdom is almost entirely unknown. Foreigners who confine their observations to the metropolitan province are apt to imagine that the conditions prevailing there are common to the whole empire, whereas they are quite exceptional. The Manchu and Mongol nobility own

vast estates seized at the time of the conquest, and these, with their ancestral estates in Mongolia and Manchuria, are cultivated in part by the labor of serfs, but generally speaking throughout the empire agricultural labor is free.

Although the transfer of slaves by written deed from one owner to another has been tolerated by Chinese law up to the present, the sale of free persons into slavery, although winked at under certain circumstances, was forbidden by the fundamental law of the empire adopted at the beginning of the present dynasty and probably even before that date. It is interesting to note, too, that so long ago as 1739 A. D., seventy years before the slave trade was forbidden by Great Britain, an Imperial edict in China forbade under penalties the traffic in natives of the East India Islands, and that a little later severe punishment was provided by statute for kidnapping and selling the indigenes of southwest China. There are many other Imperial edicts and rescripts which evidence a desire to mitigate the evils of slavery. In 1810, for instance, the hereditary slaves in certain districts in central China were emancipated by proclamation, and the statutes make abundant provision for the manumission of slaves by their masters or for their redemption with the consent of their masters. Such freedmen, however, were not permitted at once the full enjoyment of civil rights. For three generations they were permitted to engage only in agriculture, handicrafts, and trade, but afterwards, just as in the case of the reformed out-castes, the more honorable professions were open to them. Henceforth, however, such discrimination will be impossible. The slave status is abolished entirely. The old law forbade the sale of free persons into slavery, but tolerated the traffic in those already enslaved; the new law forbids the purchase and sale of any human being, and the penalties for violation of the law are increased in severity.

Slavery has never been so popular, however, among the Chinese properly so-called as among the Manchus and Mongols. One reason perhaps is that slaves are expensive, and the male slaves, at least, easily escape, despite the severity of the fugitive slave law. Under this law household slaves of the Manchus who ran away and were captured were, until 1905, punished with one hundred lashes and

branded on the left cheek with the word, "Run-away." For a second offense they were branded on the right cheek, received one hundred lashes and were compelled to wear the cangue, a heavy wooden collar, for one month. If a run-away returned of his own accord within a definite period he escaped branding up to the fourth offense. Notwithstanding this law, however, instances are not wanting of run-away slaves who have risen to positions of great power. A major-general who commanded one of the divisions of the Chinese army in 1900, and who previous to that had won some notoriety by his defeat in the Chino-Japanese war, was a hereditary slave who had escaped from his master during the Taiping Rebellion, entered the army, and risen to be an officer of some rank without discovery by others of his servile status. Fearing detection, he persuaded friends to intercede for him with his old master, who consented to burn the deed under which he had been held. No complaint was ever lodged against him; he retained his position in the army, and, later, as just stated, attained to the rank of major-general.

With regard to these three classes of slaves the report of the joint commission says that the practice of bestowing slaves upon meritorious officials was discontinued long ago, and that for many decades there has been no instance of self-surrender into serfdom and no purchase of slaves by written deeds. "The slaves of to-day," so we are told, "are descendants of those enslaved one and two centuries ago, unemancipated and unredeemed, whose plight is pitiable indeed." After such a statement one expects a strong plea for their liberation, and it is a disappointment to read that the recommendation of the Viceroy, Chou Fu, that they be given the status of hired servants and set free at the age of twenty-five years is difficult to adopt, because many of them are engaged in agriculture and their masters will not agree to the proposal. Their status is changed, indeed, to that of hired servants, but they are required to remain with their masters as though engaged for an indefinite term of years, so that the change in their condition is little more than nominal. The only improvement is that before the law they are free laborers and, in the case of offenses committed, are not liable to the severe penalties prescribed for slaves, and that, if injured by their masters or others, they have such redress as the law gives to freemen.

The report makes no mention of eunuchs in its enumeration of the slaves of the nobles, but they are doubtless included among those bestowed for meritorious services and those bought by written deeds. Most of the eunuchs come from one district of the province of Chihli, the province in which Peking is situated. Some of them sell themselves only after reaching middle age, and thus are not unprovided with descendants; others adopt children that they may have some one to worship at their graves after death. There are reported to be three or four thousand eunuchs in the Imperial palaces. The numbers allowed the nobles are strictly limited by sumptuary laws. Among these eunuchs may be found the relatives of criminals executed for heinous offenses, mention of whom has been made above.

The report shows less consideration for the interests of Chinese than for those of Manchu slave-holders. The slaves of the Chinese are all to be set free without exception. Male slaves among them are very rare; the great majority are women and girls. The commission reports some opposition to their emancipation on the ground that free servants will not obey orders and are apt to run away. The commission replies that slaves also sometimes fail to obey orders, and that it is slaves who run away; that no one ever heard of a free servant girl running away. She is her own mistress, and, if she does not like her engagement, she can quit it. The report recommends that all these slaves be given the status of free hired servants and released at the age of twenty-five years. Large numbers of the slave girls have been sold in childhood by their parents on account of poverty. The constantly recurring famines drive the starving poor to the employment of such measures, both to save the lives of their children and to lighten their own burdens. A similar practice, as Hallam tell us, obtained in Europe in the Middle Ages. Many of these girls find greater happiness in slavery than they have had in the free homes of their parents. They frequently grow up as companions to the young ladies of official families, and are given an education and provided with respectable husbands. Four years ago a Chinese Christian pastor in Peking requested a friend to intercede with a well-known prince in behalf of his sister-in-law, a slave in

the prince's household, whom he wished to redeem that she might attend school. The prince immediately sent for the young woman and, having learned from her that she wished to become a pupil in the mission school, refused to accept any ransom and immediately gave her her freedom. There are also numberless cases in which the slave girl has been set free by her master so that she might be able to become the wife of a free man, marriage of the slave and the free having been forbidden hitherto. Others are less fortunate, and not a few pass into the hands of procurers who supply the concert halls and houses of prostitution.

The old law provides special penalties for the sale of one's children into slavery, but the practice has long been winked at as affording relief for distress. The present rescript revives the law and will make such sales no longer desirable, since it permits such children to be bound out for a term of years only, that is, until reaching the age of twenty-five or under, and requires that on attaining that age the bound servant, if a man, shall become his own master, and, if a woman, either be returned to her home or provided with a husband. It is further provided that if during the period of service such children are ill treated they may be redeemed by returning a proportionate amount of the money received for them.

Even the old law required a master to provide his female slave with a husband, and, if he neglected this duty and allowed the woman to live to middle age unmarried, he was liable to a punishment of eighty blows with the heavy bamboo, or, if belonging to the gentry, to the payment of a fine.

The improvement under the present rescript is threefold: the girl is not to be treated as a slave, but as a free hired servant, and therefore eligible to marry a free man; the master is forbidden to take a price for her, but must arrange her marriage with all due formality, and the marriage must not be delayed beyond the twenty-fifth year of her age.

Many of the slave girls under the old regime became concubines of officials or wealthy merchants. Often they were trained and educated by their masters for just such a career, and were not unfrequently more accomplished than the principal wife.

The concubine in China has a legal standing. Though her position in the family is an inferior one, she enjoys the protection of the law and her children are all reckoned as children of the principal wife. They suffer no disabilities except that they take rank after the children of the principal wife.

Nevertheless, the report of the joint commission recognizes the need of apologizing for the practice of concubinage. It calls attention to the fact that western nations all forbid it, and that Japan has recently adopted the western view. The commission declares it impossible at present for China to abolish concubinage, but recommends the prohibition of bargain and sale in such secondary marriages. Henceforth the concubine is to be taken with prescribed legal ceremonies, and only under a written marriage contract duly witnessed.

By the rescript under review the old law forbidding the marriage of the slave and the free is repealed. Such distinctions are no longer to exist.

A most important provision adopted by the rescript is that requiring a careful investigation by officials of the traffic in boys and girls for immoral purposes. The old code provides penalties for such crimes, but the law has become a dead letter. New life is now to be given to it. The unmentionable vices of ancient Greece and Rome still flourish in China, and we ought not to overlook the significance of the regulation, which aims at the rescue of boys who, as well as girls, are sold into this most shameful of all forms of slavery.

The recommendations of the commission are summed up in ten regulations which are now being published in the form of an Imperial proclamation printed on yellow paper and posted throughout the empire, that no one may be ignorant of this great reform.

The report and the rescript by which it is approved will no doubt receive severe criticism, because the banner-men will still be permitted to hold so many of their fellow creatures in life-long servitude. This is to be regretted, indeed, but many great reforms have been accomplished only gradually. The children of these servants will doubtless enjoy complete freedom. In other countries, too, the

abolition of slavery has required a long period of time. Even in Great Britain the villeins were but slowly and by degrees transformed into free laborers. The rescript which has inaugurated this reform, if loyally enforced, may yet prove to be the most glorious achievement of the new reign so auspiciously begun. It will mark an era in the social life of the Chinese and will quicken hope in the breasts of thousands who have only known despair.

E. T. WILLIAMS.

PRINCIPLES OF INTERNATIONAL LAW APPLIED BY THE SPANISH TREATY CLAIMS COMMISSION

The treaty of peace, concluded at Paris, between the United States and Spain, December 10, 1898, provided, in Article VII, as follows:

The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government or of its citizens or subjects, against the other Government that may have arisen since the beginning of the late insurrection in Cuba, and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war. The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article.

By an Act of Congress approved March 2, 1901, a Commission to be composed of five members appointed by the President, by and with the advice and consent of the Senate, was created to examine and adjudicate all the claims of the citizens of the United States, which the United States, by the above article, agreed to adjudicate and settle. The same Act made provision for an additional Assistant Attorney-General to appear and defend the United States in all proceedings before the Commission. The Commission constituted pursuant to the provisions of this Act completed its work on May 2, 1910.

CLAIMS ADJUDICATED

Five hundred and forty-two (542) claims were filed with the Commission. The total amount of these claims, according to the petitions with amendments filed prior to April 9, 1902, was \$62,672,077.28. By subsequent amendments, the amount was increased to \$64,931,694.51. The awards made by the Commission amount to \$1,387,845.74. Claims were presented for damages sustained by American citizens in the Philippines, the Caroline Islands, Porto Rico, and the United States, but the larger number resulted from the destruction of property in Cuba during the insur-

rection of 1895 to 1898. This necessitated the taking of the bulk of the testimony in Cuba, a foreign jurisdiction. In taking testimony, the Commission enjoyed the same powers as do the Circuit and District Courts of the United States. It was represented in Cuba by Commissioners authorized to take the testimony. Subpœnas for witnesses were issued, and oaths were administered by the Cuban courts pursuant to a military order of Governor-General Wood while the island was still under the military occupation of the United States. Only through this act of comity of the local courts could a delinquent witness be compelled to attend or an untruthful witness be punished for perjury. Considerable evidence was received from Spain from the military records or through written interrogatories.

GENERAL PRINCIPLES

The organic Act of March 2, 1901, provided in section 1, that the Commission should

adjudicate said claims according to the merits of the several cases, the principles of equity, and of international law.

It further provided, in section 11, that the award in favor of any claimant should be only for the amount of the actual and direct damage which the claimant should prove that he had sustained, and that remote or prospective damages should not be awarded, nor should interest be allowed. With the exception of these provisions, there were no express restrictions on the powers of the Commission in the adjudication and settlement of the claims. The Act provided that all awards of the Commission should be final unless a new trial or rehearing should be granted by the Commission within sixty days after making the award. In case the Commission was in doubt as to any question of law arising upon the facts, it was authorized to state the facts and question of law so arising and certify the same to the Supreme Court for its decision. No such certification to the Supreme Court was made by the Commission. Although a creation of the municipal law of the United States, the Commission exercised the functions of an international tribunal, in which were to be administered the principles of international law and of equity by which the liability of an independent nation was to be determined.

On April 28, 1903, the Commission finally announced that it would be governed by the following principles:

1. Under Article VII of the Treaty of Paris the United States assumed the payment of all claims of her own citizens for which Spain would have been liable according to the principles of international law. It follows, therefore, that the sole question before this Commission is that of the primary liability of Spain, which is not in any way enlarged by the agreement of the United States to adjudicate and pay such claims.

2. Although the late insurrection in Cuba assumed great magnitude and lasted for more than three years, yet belligerent rights were never granted to the insurgents by Spain or the United States so as to create a state of war in the international sense which exempted the parent government from liability to foreigners for the acts of the insurgents.

3. But where an armed insurrection has gone beyond the control of the parent government the general rule is that such government is not responsible for damages done to foreigners by the insurgents.

4. This Commission will take judicial notice that the insurrection in Cuba, which resulted in intervention by the United States and in war between Spain and the United States, passed, from the first, beyond the control of Spain, and so continued until such intervention and war took place.

If, however, it be alleged and proved in any particular case before this Commission that the Spanish authorities by the exercise of due diligence might have prevented the damages done, Spain will be held liable in that case.

5. As war between Spain and the insurgents existed in a material sense, although not a state of war in the international sense, Spain was entitled to adopt such war measures for the recovery of her authority as are sanctioned by the rules and usages of international warfare. If, however, it be alleged and proved in any particular case that the acts of the Spanish authorities or soldiers were contrary to such rules and usages Spain will be held liable in that case.

6. As this Commission has been directed by Congress to ascertain and apply the principles of international law in the adjudication of claims of neutral foreigners for injuries to their persons and property caused by a parent state while engaged in subduing by war an insurrection which had passed beyond its control, it can not fail, in determining what are and what are not legitimate war measures, to impose upon the parent state such limitations as the consensus of nations at the present day recognizes as restricting the exercise of the right to remove all the inhabitants of a designated territory and concentrate them in towns and military camps and to commit to decay and ruin the abandoned real and personal property or destroy such property and devastate such region.

7. Adopting therefore a wide and liberal interpretation of the principle that the destruction of property in war where no military end is served is illegitimate, and that there must be cases in which devastation is not

permitted, it should be said that whenever reconcentration, destruction, or devastation is resorted to as a means of suppressing an insurrection beyond control the parent state is bound to give the property of neutral foreigners such reasonable protection as the particular circumstances of each case will permit. It must abstain from any unnecessary and wanton destruction of their property by its responsible military officers. When such neutral foreigners are included in the removal or concentration of inhabitants, the government so removing or concentrating them must provide for them food and shelter, guard them from sickness and death, and protect them from cruelty and hardship to the extent which the military exigency will permit. And finally, as to both property and persons, it may be stated that the parent state is bound to prevent any discrimination in the execution of concentration and devastation orders against any class of neutral foreigners in favor of any other class or in favor of its own citizens.

8. Subject to the foregoing limitations and restrictions, it is undoubtedly the general rule of international law that concentration and devastation are legitimate war measures. To that rule aliens as well as subjects must submit and suffer the fortunes of war. The property of alien residents, like that of natives of the country, when "in the track of war," is subject to war's casualties, and whatever in front of the advancing forces either impedes them or might give them aid when appropriated or if left unmolested in their rear might afford aid and comfort to the enemy, may be taken or destroyed by the armies of either of the belligerents; and no liability whatever is understood to attach to the government of the country whose flag that army bears and whose battles it may be fighting.

If in any particular case before this Commission it is averred and proved that Spain has not fulfilled her obligations as above defined she will be held liable in that case.

9. It is the opinion of the Commission that the treaty of 1795 and the protocol of 1877 were in full force and effect during the insurrection in Cuba, and they will be applied in deciding cases properly falling within their provisions.

10. As to the first clause of Article VII of the said treaty, wherein it is agreed that the subjects and citizens of each nation, their vessels, or effects shall not be liable to any embargo or detention on the part of the other for any military expedition or other public or private purpose whatever, the Commission holds that whether or not the clause was originally intended to embrace real estate and personal property on land as well as vessels and their cargoes, the same has been so construed by the United States, and this construction has been concurred in by Spain; and therefore the Commission will adhere to such construction in making its decisions.

11. But neither this particular clause nor any other provision of the treaty of 1795 will be so applied as to render either nation, while endeavoring to suppress an insurrection which had gone beyond its control,

liable for damages done to the persons or property of the citizens of the other nation when found in the track of war or for damages resulting from military movements unless the same were unnecessarily and wantonly inflicted.

Principles Nos. 2 and 9 were concurred in by all the Commissioners. Each of the others was sustained by a majority. These principles are in general terms and are very comprehensive. Their application to the special facts in individual cases was often a matter of difficulty. According to these principles the burden of proof was on the claimants to show, in case of destruction by the insurgents, that Spain was negligent in not affording protection to the property destroyed, and in case of destruction by the Spanish military authorities that the destruction was wanton and unnecessary or not a legitimate war measure. The general principle that the parent government is not responsible for the acts of insurgents beyond its control was clearly announced by the Department of State in the early stages of the insurrection. On July 1, 1895, in reply to a request of certain property holders in Cuba as to the liability of Spain for acts of the insurgents, Mr. Uhl, Acting Secretary of State, advised that,

It is a generally accepted principle of international law that a sovereign government is not ordinarily responsible to alien residents for injuries that they may receive within its territories from insurgents whose conduct it cannot control. Within the limits of usual effective control law-abiding residents have a right to be protected in the ordinary affairs of life and intercourse, subject, of course, to military necessities, should their property be situated within the zone of active operations. The Spanish authorities are reported to be using strenuous endeavors to prevent the class of spoliations which the writers apprehend, and notification of any particular apprehended danger from the insurgents would probably be followed by the adoption of special safeguards by the authorities. In the event, however, of injury, a claim would necessarily have to be founded upon averment and reasonable proof that the responsible officers of the Spanish Government, being in a position to prevent such injury, have failed to use due diligence to do so.

Mr. Adee, Acting Secretary of State, in a communication, August 30, 1895, to the Mapos Sugar Company, subsequently a claimant before the Commission, reiterated this principle in similar language.

In a note, April 17, 1883, to Mr. De Bounder de Melsbroeck, Belgian minister, Mr. Frelinghuysen, Secretary of State, said:

The property of alien residents, like that of natives of the country, when "in the track of war," is subject to war's casualties, and whatever in front of the advancing forces that either impedes or may give them aid when appropriated, or which, if left unmolested in their rear, might afford aid and comfort to the enemy, may be taken or destroyed by the armies of either of the belligerents, and no liability whatever is understood to attach to the government of the country whose flag that army bears, and whose battles it may be fighting.

Principle No. 8, announced by the Commission, follows the wording of this note.

CITIZENSHIP

The Commission, although a creation of municipal law, enjoyed the jurisdiction of an international tribunal in which the primary question to be determined in each case was the liability of Spain under the principles of international law and of equity. Exercising this jurisdiction, it was held by the Commission that the judgment or order of naturalization of a domestic court of the United States was not conclusive upon Spain, and, accordingly, not upon the defendant. The standard of proof required to overcome the presumption of citizenship raised by the record of naturalization was defined by Mr. Commissioner Chambers, speaking for the Commission, as follows:

The burden upon the defendant in this case is to prove the legal fraud perpetrated by claimant in the procurement of his naturalization certificate and cannot be shifted by evidence showing errors or irregularities in the proceedings or by raising a doubt merely in the mind of the Commission. The proof can not stop at showing that the facts made to appear to the satisfaction of the court which granted naturalization were false. It must at least go to the extent of satisfying the Commission that the claimant knew the statements and representations made by him at the time he filed his original declaration and at the time of procuring the judgment were false, or facts must be proven from which such fraud would be implied, and it must appear that his false representations and the representations procured by him to be made by the other witnesses were intentionally used by him for the purpose of deceiving the court and thereby securing his certificate of naturalization.

More than two-thirds of the claimants were naturalized citizens, and of these the greater proportion were native Spaniards naturalized during the period of the Ten Years' War of 1868-1878. Many were naturalized under the provisions of the Act of 1824, later embodied in Section 2167, Revised Statutes, now repealed, by which a person who had resided in the United States three years next preceding his arriving at the age of twenty-one years, and who had "continued to reside" therein to the time of making application to be admitted a citizen, might, after having arrived at the age of twenty-one years, and after having resided within the United States five years, including the three years of his minority, be admitted to citizenship without having made the declaration of intention two years previously thereto. The following are illustrative cases in which the Commission held that there was such a failure to comply with the requirement of continuity of residence under the above section that the claimant was denied a standing before the Commission "for lack of citizenship:" José Tur, No. 269, interruption of about eleven years; Pedro y Piedra, No. 241, interruption of about sixteen years; Ramirez, No. 164, interruption of about eighteen years; Larrondo, No. 88, of about four years; Sieglie, No. 116, of about twenty years, — with the exception of an occasional brief visit to the United States during the period. In the cases of Bauriedel, No. 239; Iznaga, No. 111, and Landa, No. 217, the claimants had each made their declaration of intention while minors. Awards were made to Bauriedel and Iznaga and their citizenship accordingly sustained. The case of Landa was dismissed, but on other grounds. The claimant in the case of Urgalles, No. 523, first arrived in the United States August 16, 1880, and was naturalized April 8, 1885, after a residence of only four years, seven months and twenty-three days. This case was dismissed for lack of citizenship. A large number of the claimants were naturalized while attending school in the United States, receiving at the same time support from their parents, natives and residents of Cuba. After the completion of their education and admission to citizenship, they frequently returned to Cuba, engaged in business, and never returned again to the United States. It was the contention of the

defendant in these cases that the domicile of the minor being that of the father, the claimant had never fulfilled the requirements of the five years' residence in the United States; and, furthermore, that by a continued residence abroad after admission to citizenship, he had abandoned his citizenship, if acquired. The Commission accepted neither of these contentions. No case was dismissed on either of these grounds, although many of the claimants had not resided in the United States since the close of the Ten Years' War in 1878. A typical, but not an extreme case, is that of Abraham and Gonzalo Morejon, No. 27. The facts were as follows: Gonzalo Morejon was born in Cuba of Spanish parents, September 20, 1855. He came to the United States in May, 1871, attended school in Maine and Massachusetts, graduating from the School of Technology, in Boston, in February, 1878. He was naturalized in Boston September 21, 1876, at the exact age of twenty-one years, returned to Cuba in February, 1878, immediately after his graduation, where he has ever since resided. His parents never resided in the United States. In 1880 he was three months in Key West, otherwise he has not been within the United States since his return to Cuba in 1878. He is the owner of considerable property in Cuba. Abraham Morejon, his brother, was born in Cuba of Spanish parents March 16, 1857. He came to the United States in May, 1871, attended school in Maine and Pennsylvania, graduating from the Medical College of Philadelphia in March, 1879. He returned to Cuba the month after graduation and has since been to the United States only on two visits to Key West in 1882 or 1883. He married a Spanish subject and has eleven children. Neither his wife nor any of his children has ever been in the United States. He never owned any property in the United States. He was naturalized in Philadelphia October 5, 1878. The citizenship of both of these claimants was sustained.

Children born abroad whose fathers were at the time of their birth citizens are by the laws of the United States declared to be citizens, provided the right of citizenship shall not descend to children whose fathers have never resided in the United States. The Constitution of Spain includes as Spaniards persons born in Spanish territory.

The Civil Code, however, provides that children of a foreigner born in Spanish dominions shall declare within a year following their majority or emancipation if they desire to enjoy the status of Spaniards (Article 19). In the case of conflicting laws on citizenship, the law of the claimant's domicile should prevail before an international tribunal. In no case, except possibly one, does it appear that the right of the claimant to a standing before the Commission as an American citizen was denied to a person claiming American citizenship by birth to American parents in Spanish territory. The case of Jemot, No. 187, appears to have been dismissed on the ground that claimant failed to indicate his election of American citizenship. The claimant in that case was born in Cuba of American parents, and at the time of testifying was fifty-one years of age. He had never been in the United States except part of a year when a young child, and there was no evidence of any election of American citizenship on his part.

It was held by the Commission that the citizenship of the wife follows that of the husband (Casanova, No. 33; Otazo, No. 470).

• CORPORATIONS

In the treaty of peace by which the United States agreed to adjudicate the claims, as also in the organic Act creating the Commission, no special reference was made to artificial persons. The Commission was created to "receive, examine and adjudicate all claims of citizens of the United States against Spain, which the United States agreed to adjudicate and settle" by Article VII of the Treaty of Paris. The question of the right of corporations chartered under the laws of the States of the Union to present claims before the Commission was raised by the Government by filing pleas in abatement. The Commission, in passing on these pleas, decided that a corporation could prosecute a claim to adjudication, but reserved the right to determine on final consideration in case a claim was established, whether or not any part of the award should inure to the benefit of the shareholder, who, as an individual, could not have prosecuted a claim to adjudication. Several cases were thereafter prosecuted to final determination by claimant corporations and

awards were made in favor of the corporations regardless of the citizenship of the individual stockholders.

In three cases, the Constancia Sugar Company, No. 196; the Central Tuinucu Sugar Cane Manufacturing Company, No. 240, and the Narcisa Sugar Company, No. 139, nearly all of the stock was held by Spanish subjects at the time of the destruction for which claim was made, as also at the time of the conclusion of the Treaty of Peace. In the Constancia, 4,975 of a total of 5,000 shares; in the Tuinucu, 1,390 of a total of 1,500 shares, and in the Narcisa, 1,960 of a total of 2,000 shares, were held by Spanish subjects. In each of these cases an award was made in favor of the claimant corporation. The decision in the case of HERNSHEIM, No. 297, is no exception to the holdings in these cases. This claim was presented in the name of Isidore HERNSHEIM, in trust for the stockholders of S. HERNSHEIM Brothers and Company, Limited. The firm of HERNSHEIM Brothers and Company was incorporated under the laws of Louisiana, April 14, 1896, and on April 16, 1901, a resolution was passed by the board of directors making an equitable assignment of the claim against the United States to Isidore HERNSHEIM in trust for the stockholders of the company as they then existed. Subsequently, but at the same meeting, a resolution was passed appointing two liquidators to settle up such affairs of the corporation as remained undisposed of. However, "there was nothing for them to do, the business having been already practically closed up." The corporation went into liquidation and the liquidation was completed in 1901 under the laws of Louisiana. The claimant was therefore a naked trustee to receive and distribute the proceeds of any award which might result from the claim for the use and benefit of certain individuals who were formerly stockholders in a corporation now extinct. These beneficiaries were, therefore, the real parties in interest. The Commission made the following order of award:

This case was submitted upon petition, answer and evidence, and the Commission being of the opinion that the claimant is entitled to relief, an award is hereby made in his favor against the United States for the sum of \$23,848, being 2,168 twenty-five hundredths of \$27,500.00, being the damages caused by the delay of the Spanish authorities in Cuba, in the years 1896 and 1897, in permitting the exportation of tobacco of the

claimant; no award being made for the benefit of the owners of 332 twenty-five hundredths of the tobacco on account of their lack of citizenship. (Commissioner Maury did not sit.) (Commissioner Chandler dissents from the award.) (Adopted December 22, 1906.)

PERSONAL INJURIES

There were filed 152 claims, aggregating \$2,825,200, for death or personal injury as the result of the blowing up of the battleship *Maine* in Havana harbor, February 15, 1898. These were all dismissed by the Commission (Commissioner Chambers dissenting) on the ground that no individual claim against a foreign government arises in favor of an officer or seaman of a ship of war who receives injuries to his person in the line of duty; and that the claim against the foreign government is wholly national. Any injury to an officer or seaman is merged in the national claim and he must look to his own government for remuneration.

By the Cushing-Calderon protocol of January 12, 1877, which was in force during the insurrection, American citizens in Cuba were entitled to a trial by the ordinary jurisdiction, regardless of the nature of the offense, except in case of being captured with arms in hand, in which event they were entitled to a trial by ordinary council of war in conformity with Article 2 of the law of April 17, 1821. A large number of claims were presented for injuries suffered as a result of alleged wrongful arrest, detention or infliction of death. Awards were made in twenty-one of these cases. In the Otazo case, No. 470, and in the Govin case, No. 28, awards respectively of \$30,000 and \$20,000 were made for the wrongful infliction of death to American citizens. The victim in the Otazo case was, according to the evidence presented by the claimant, taken from his home on the night of October 31, 1896, by direction of a subordinate Spanish officer, and deliberately killed without a trial of any kind. In the Govin case the victim, Charles Govin, accompanied the filibustering expedition of the *Three Friends* which left Key West and landed in Cuba July 6, 1896. He went as an accredited correspondent of the *Daily Equator Democrat* of Key West. According to the testimony offered by the claimant, three days after landing, Govin was captured in company with several insurgents, and on the

following morning was killed, as also were three of his companions. There was some testimony to show that Govin drilled in Key West with the expeditionary forces, and that at the time of his capture he was armed. In the case of Ruiz, No. 112, an award of \$40,000 was made. Dr. Ruiz was arrested February 4, 1897, on the charge of having been implicated with the insurgents in derailing a train. He was thrown into prison and kept incommunicado where he mysteriously died after fourteen days pending the settlement between the Governments of the United States and Spain of his right, under the protocol of 1877, to have his case transferred from the military to the civil tribunal.

Although no award was made merely for the arrest of American citizens, awards were made in several cases for wrongful detention and treatment after arrest. The most aggravated of these cases was that of Larrieu, No. 468a. Francisco Larrieu, an American citizen, resident of Cardenas, Cuba, was arrested in that city by the authorities on May 15, 1896. He was not released until March 11, 1897, and died in March, 1901, in his forty-eighth year. Some evidence was offered in support of the allegation that his death directly resulted from the treatment accorded him during his long imprisonment. The Commission awarded \$50,000. In the case of Louis Someillan, No. 167, the claimant was twice arrested and detained by the Spanish authorities — January 15, until April, 1896, and July 7 to November 26, 1896. Upon his release, in November, 1896, he was expelled from the island. The evidence before the Commission clearly established the fact that a son, with the same name, and in business with the claimant in Havana, was the agent of the Cuban Junta, and assisted in transmitting information as to the landing of expeditions between the Cuban authorities in the field and their agents in Key West. The evidence, however, failed clearly to establish the implication of the claimant in this service, and an award of \$20,000 was made. In Scott, No. 328, the claimant was arrested and detained from January 8, 1897, to March 27, 1897, on which date he was expelled from the island. The Commission awarded \$5,000. In these claims resulting from arrest and imprisonment, in which awards were made, there was evidence to show either a failure of the Spanish

authorities to comply with the guarantee of the rights of trial in the protocol of 1877, undue delay in effecting a trial, or mistreatment of the person during confinement.

DAMAGES BY INSURGENTS

The claimants were not entitled, according to the governing principles announced by the Commission, to recover for damages done by the insurgents unless it was alleged and proved in the particular case that the Spanish authorities, by the exercise of due diligence, might have prevented the damages. The leading case before the Commission on the question of due diligence was the Hormiguero, No. 293. A large part of this claim was for the destruction of cane fields and other property by the invading forces of Generals Maceo and Gomez on December 15, 1895. The insurrection began February 25, 1895, by a simultaneous uprising at various points throughout the island. To give system and enthusiasm to the separated groups of insurgents, General Maximo Gomez and General Antonio Maceo traversed during October, November, and December, 1895 with a large but varying force, the island from east to west. Claimant's estate was located in the Province of Santa Clara, north of the city of Cienfuegos, midway between the eastern and western extremities of the island, and in the track of the forces of Gomez and Maceo. It was contended by the claimant that the damages committed by these invading forces resulted from the negligence of Spain in not preventing the landing of both Maceo and Gomez in the eastern extremity of Santiago Province in March and April, in not suppressing the insurrection at its very outbreak, in not preventing the landing of the Roloff-Sanchez expedition in July, 1895, by which the forces of Santa Clara Province were supplied with arms and ammunition, in not preventing the crossing of the Jucaro-Moron Trocha by the invading forces, and in not preventing various other movements of the insurgent forces prior to the date of the damages for which claim was made. The Commission, however, held that the contentions of the claimant in these particulars were not sustained by the evidence. In the opinion handed down by the Commission (Maury dissenting) the following statement was made:

The Commission having previously held that the insurrection from the first, as a whole, went beyond the control of Spain, and it appearing and being conceded by the claimant in this case that the Spanish troops did not fail to use due diligence on the 15th of December at Hormiguero, it is questionable whether the Commission is authorized to review the military situations and operations at the various times and places mentioned, so remote were they from the 15th of December and Hormiguero, and to condemn the plans, acts, and omissions of the military commanders as proving such a lack of due diligence on the part of the Spanish authorities as to make Spain liable for the damages done by the insurgents at that time and place. At all events, it is certain that no legal precedents have been found which would in our opinion, justify the Commission in entering upon such review and condemnation.

Under this ruling of the Commission, in order to establish liability of Spain for damages by insurgents it was necessary to prove the failure of the Spanish authorities at the *time* and *place* to exercise due diligence in affording protection. A large amount was claimed before the Commission for the burning of cane by the insurgents. Early in the insurrection the general in charge of the Cuban forces, with the twofold purpose of depriving the Spanish Government of revenue and of compelling, by removing the possibility of employment, the *colonos* and laborers on the sugar plantations to join the Cuban forces, ordered the burning of cane fields. The order was subsequently limited to those estates which attempted to grind. The evidence taken in the cases before the Commission clearly established as a general proposition the impossibility of protecting, by forces of the regular army, the extensive cane fields throughout the Island. In only one case, that of the Central Tuinucu Sugar Company, No. 240, was recovery for the burning of cane fields by the insurgents granted. The facts in this case were peculiar. The Commission found in this case evidence to show that the insurgents threatened to destroy the property if an attempt at grinding was made, that the Spanish authorities ordered the claimant to proceed with the grinding and promised protection. While a Spanish force of 350 men was erecting fortifications on the batey, the insurgents began burning the cane fields of the estate and continued burning them for several days, until the fields were nearly all burned. The Spanish forces remained within the batey and made no effort to

prevent the burning. It was contended by the defendant that it was a question of military discretion, which could not be reviewed by the Commission, on the part of the commanding officer whether he should divide his forces in order to prevent the burning of the cane, and possibly so weaken the force on the batey as to enable the insurgents to burn the mill or whether he should keep his forces united for the protection of the buildings of the batey. The Commission held, however, that the Spanish authorities were negligent and made an award accordingly.

In the case of Rodriguez, No. 479, an award was made for the destruction of household goods by the insurgents, the Spanish authorities having arbitrarily refused the claimant permission to remove them to a place of safety. So also in the case of Thorne, No. 248, an award was made for a quantity of tobacco burned by the insurgents, it appearing to the Commission that the claimant had been prevented by the Spanish authorities from removing it to a place of safety. In reporting these cases the Commission says:

In neither of the above-cited cases was it shown that by reasonable diligence the Spanish Government could have prevented the destruction of the buildings, but having unreasonably refused to permit the removal of the household goods in the one case, and having actively and without warrant interrupted and prevented the removal of the tobacco in the other case, awards were made the respective claimants, the Commission feeling that it was justified under the broad jurisdiction granted it by statute to disregard the strict application to these cases of the common-law principles which, if applied, would perhaps have prevented a recovery and defeated what were regarded by the Commission as meritorious claims.

ACTS OF SPANISH AUTHORITIES

In order to recover for the burning of property by the Spanish authorities it was necessary, under the ruling of the Commission, to show either that the burning was wanton and unnecessary, or that it was not a legitimate war measure. In no case was a claimant successful in recovering for the burning of cane by Spanish authorities, and in only a few cases were awards made for the burning of buildings by the Spanish authorities. (Casanova, No. 33.) The evidence before the Commission in the various cases showed that a large part of the burning of buildings chargeable to the Spanish

authorities was for the effective enforcement of the concentration of the rural population in fortified centers, which was recognized as a legitimate war measure. If, however, the Spanish authorities appropriated or made use of the claimant's property, relief was granted. Awards were made in many cases for the appropriation of cane tops for forage, the use of buildings as quarters for the troops or for reconcentrados or for other purposes. In the *Constancia*, No. 196, an award was made for the use of claimant's private railway by the Spanish troops. The largest and most numerous awards were made for the appropriation of cattle by the troops. (*Reyes*, No. 153; *Del Valle*, No. 222; *Del Valle*, No. 278; *Iznaga*, No. 279; *Iznaga*, No. 111.) Of the principle of liability for the appropriation of private property as distinguished from the principle of liability for its destruction the Commission in its final report says:

Awards were * * * made for appropriations of property by the Spanish authorities in cases where the property was *used* by such authorities, regardless of the purpose of the appropriations. In other words, a different rule was applied in cases where property was *destroyed* to prevent its falling into the hands of the enemy from that applied where property, for like purpose, was seized and *used* by the Spanish authorities. In the one case, ordinarily the state, under international law, incurs no liability, while in the other, the owner of the property, in the class of cases passed upon by the Commission, is, in the opinion of the Commission, entitled to compensation for the property so appropriated and used.

In these cases (cattle cases) the Spanish officials, operating from their permanent garrisons, made the appropriations systematically from time to time, taking live stock for the sustenance of the garrisons and for shipment to the larger cities in the island. These appropriations for shipments were undoubtedly made for the double purpose of furnishing supplies to the Spanish soldiers stationed at the points to which the cattle were consigned, and at the same time to prevent their appropriation by the insurgents.

Under number 10, of the governing principles announced by the Commission in April, 1903, and given above — that the stipulation in Article VII of the treaty between the United States and Spain of 1795, that the subjects and citizens of each nation, their vessels or effects, should not be liable to any embargo or detention on the part of the other for any military expedition or other public or private purpose whatever, embraced property on land as well as

vessels and their cargoes — awards were made in the cases of Hernalheim, No. 297; Bauriedel, No. 239, and Gato, No. 171, for the detention of tobacco in Havana under a decree of the Governor and Captain-General of May 16, 1896, prohibiting the exportation of leaf tobacco from the Provinces of Havana and Pinar del Rio.

AID TO THE INSURGENTS

In several cases there was testimony tending to show that the claimants had sympathized with the insurgents in their struggle against Spain; but it was difficult to prove positive acts of hostility to the Spanish Government. In the case of Caldwell, No. 283, the claimant admitted voluntary enlistment and service with the Cuban forces; and his claim for property losses was dismissed on final hearing. Likewise one of the claimants in Jova, No. 122, admitted service in the Cuban Army; and redress for property losses was denied him. In Iznaga, No. 111, the claimant, with the consent of the Spanish authorities, paid to the insurgents certain amounts for permission to remove his cattle from his estates. The evidence showed that he was unable without this permission or without the protection of the Spanish troops to remove his cattle. He was not for these payments denied a standing before the Commission. The claimant in Bauriedel, No. 239, likewise received an award although the evidence showed a contribution by him of \$2,500 to the Cuban Junta for permission to remove lumber from the interior of the island. According to the testimony of the claimant this payment was made only after advising with the American Consul-General and solely in order to save the lumber which the insurgents had prevented him from removing.

Few written opinions were filed by the Commission. The principles involved and decided in a particular case can accordingly be determined only by an examination of the evidence with the order of award or dismissal.

SAMUEL B. CRANDALL.

EARLY CASES ON THE DOCTRINE OF CONTINUOUS VOYAGES

So much has been written on the doctrine of continuous voyages as a principle of international law, and the authorities, especially those in English, have been so thoroughly exhausted, that another article upon the same subject should not be intruded upon readers except perhaps by reason of a novel treatment of the subject or the presentation of new facts. The latter will, it is hoped, furnish sufficient excuse for the appearance of this paper.

The doctrine is but an application of the general rule of law that one is not "permitted to do by indirection what he is forbidden to do directly."¹ On this principle it would seem that the doctrine of continuous voyage is applicable whenever an intermediate port is fraudulently interjected into a voyage which, if direct, would by the law of nations be illegal. In practice, as is well known, the theory of continuous voyages has been applied chiefly in four sorts of cases: where subjects of a belligerent trade with the enemy; where subjects of a neutral carry on the coastwise or colonial trade of a belligerent contrary to the rule of the war of 1756; where a neutral carries contraband to a belligerent port; where a neutral intends ultimately to break a blockade. It will be convenient to treat these four classes in the inverse order beginning with the cases of blockade.

Justice Elliott² has almost exhausted the discussion on this branch of the subject, especially as to the soundness of the reasoning on which the application of the doctrine to blockade running rests. One of the grounds on which the doctrine can be justified and at the same time reconciled with previous decisions on the law of blockade seems to be that of fraudulent intention. When a neutral vessel, sailing from neutral port A to neutral port B, with the subsisting intention of leaving port B for the purpose of running the blockade of

¹ Elliott: *The Doctrine of Continuous Voyages*, this JOURNAL, 1:96.

² *Ibid.*, 75 et seq.

an enemy port, is captured between ports A and B, condemnation on the ground of the intent to defraud appears reasonable. It is, moreover, in accord with the view laid down by Sir William Scott in the early case of the *Columbia*.³ This was the case of an American vessel which sailed from America for Amsterdam without knowledge that Amsterdam was blockaded. The vessel called at Cuxhaven, where the master learned of the blockade but nevertheless attempted to enter the port of Amsterdam and in such attempt the vessel was captured. Sir William Scott said:

It is said also that the vessel had not arrived; that the offense was not actually committed, but rested in intention only. On this point I am clearly of opinion that the sailing with an intention of evading the blockade of the Texel was beginning to execute that intention, and is an overt act constituting the offense. From that moment the blockade is fraudulently invaded. I am, therefore, on full conviction, of opinion that a breach of blockade has been committed in this case.

It may be observed that the intent to defraud appears to be for the purpose of trade; for egress in ballast would seem to be no breach of blockade,⁴ nor egress with cargo loaded previous to the blockade,⁵ but ingress in ballast, being presumed to be for purposes of trade,⁶ is illegal, and egress in ballast of an enemy ship sold to a neutral while lying in a blockaded port would probably be held illegal,⁷ whereas the transfer between neutrals under similar circumstances has been held legal.⁸ Thus it would seem that the essence of the offense is an intent to defraud the belligerent of his legal rights "not merely to prevent an importation of supplies, but to prevent export as well as import and to cut off all communication of commerce with the blockaded place."⁹

³ 1 C. Rob. 154; see also *Frederick Molke*, 1 C. Rob. 86, and *Neptunus*, 1 C. Rob. 170.

⁴ *Potsdam*, 4 C. Rob. 89.

⁵ *Betsy* (1798), 1 C. Rob. 93; *Juffrow Maria Schroder*, 1 Roscoe's Eng. Pr. Cas. 356, note; *Otto & Olaf* (1855), Spinks 257.

⁶ *Comet*, Edw. 32.

⁷ *General Hamilton*, 6 C. Rob. 61.

⁸ *Potsdam*, *supra*.

⁹ Sir William Scott in *Frederick Molke*, 1 C. Rob. 86; *Vrouw Judith*, 1 C. Rob. 150.

The exceptions to the rule laid down in the above quotation from the case of the *Columbia* are more apparent than real. For example, it is legal for a ship to make for a port known to be blockaded under stress of an uncontrollable accident,¹⁰ or for a ship to sail for a blockaded port under a license of the blockading power to trade therewith,¹¹ or to sail for a distant blockaded port with the expectation of inquiring at an intermediate port whether the blockade had been raised,¹² because in all of these cases the intent to defraud is obviously absent. The last exception just mentioned was based upon the tardiness of communication a century ago whereby the commerce of remote neutral countries suffered unduly from lack of information when a blockade had ceased to exist. A fourth apparent exception, however, not so obviously reconcilable to the idea of a subsisting intention, is that a voyage to an unblockaded port for the purpose of inland transportation of the cargo to a blockaded port is legal.¹³ But it seems that when a belligerent leaves any port of the enemy open to commerce it must be presumed that he does so voluntarily and with a knowledge of the consequences. In other words, it may be considered as a tacit permission for neutrals to use the port. Consequently the element of fraud is absent. This appears to be one ground of Sir William Scott's decision in the *Stert*, *supra*. The other ground in his decisions on this point is generally based on the definition of blockade — that it is an investment by vessels and a severance of communication on the marine side only and not on the land side of the port.

Again, it may be observed that the intent to defraud is in some cases a *legal intent* to be conclusively drawn from certain circumstances surrounding the case. Thus, from the circumstance of a

¹⁰ *Fortuna* (1803), 5 C. Rob. 27; *Arthur* (1810), Edw. 202; *Hurtige Hane* (1799), 2 C. Rob. 124; *Charlotta* (1810), Edw. 252.

¹¹ *Juno* (1799), 2 C. Rob. 116.

¹² *Betsey* (1799), 1 C. Rob. 332; *Shepherdess* (1804), 5 C. Rob. 262; *Spes and Irene* (1804), 5 C. Rob. 76.

¹³ *Jonge Pieter* (1801), 4 C. Rob. 79. See conversely *Stert* (1801), 4 C. Rob. 65, where goods were sent from a blockaded port by inland navigation to an open port, where they were laden on shipboard. Similarly, *Ocean* (1801), 3 C. Rob. 297.

ship's lying in suspicious proximity to a blockaded port, Sir William Scott was inclined to state that

It would * * * be no unfair rule of evidence to hold, as a presumption *de jure*, that she goes there with an intention of breaking the blockade; and if such an inference may possibly operate with severity in particular cases, where the parties are innocent in their intentions, it is a severity necessarily connected with the rules of evidence and essential to the effectual exercise of this right of war.

I do not, however, lay down the general rule on the present occasion, as I think it is not rendered necessary by the circumstances of the case. I will take it on the point contended for that notwithstanding the suspicions arising from the nature of the situation, it might still be open to the parties to show the innocence of their intentions by clear and satisfactory evidence and to exonerate themselves from the penalty of the law.¹⁴

Nevertheless, finding the evidence insufficient, he condemned both ship and cargo.

In the similar case of the *James Cook*,¹⁵ where a ship was captured at the mouth of the blockaded port, the same eminent judge took a similar position and said:

The situation of the vessel will justify the legal conclusion that the master intended going into that port for the purpose of disposing of his cargo and throws the onus upon him of exonerating himself by just and satisfactory explanations.

After reviewing the depositions of the master and crew, he continues:

Upon all this evidence I think it is not an arguable proposition that there was not an intention of going into that port * * *. The ship is captured in a place where the fact is conclusive against her, for it has been determined over and over again that a ship is not at liberty to go up to the mouth of a blockaded port even to make inquiry. That in itself is a consummation of the offense and amounts to an actual breach of the blockade.

That the intention is the essence of the offense is well shown by the opportunity allowed even in these two strong cases of showing an innocent intention. Other cases have held that the *delictum* of sail-

¹⁴ *Neutralitet* (1805), 6 C. Rob. 30.

¹⁵ *James Cook* (1810), Edw. 261.

ing with an intention to break a blockade may be purged in the course of the voyage by changing the intention to go to the blockaded port¹⁶ and that sailing ignorantly to a blockaded port is no offense under the law of nations.¹⁷

This review of the cases would seem to show that the intention is the controlling element in the legal offense of a breach of blockade. If this is so, there would seem to be no difficulty in reconciling the doctrine of continuous voyages with the theory of breach of blockade as laid down in the decisions of the courts.

The United States has generally been credited¹⁸ with having first applied the doctrine of continuous voyages to blockade running during the Civil War when British vessels plied between England and Nassau with an ultimate destination to the Confederate ports. The earliest cases cited by Justice Elliott¹⁹ are the *Dolphin*,²⁰ *Pearl*,²¹ *Stephen Hart*,²² *Circassian*,²³ *Bermuda*,²⁴ *Peterhof*,²⁵ and *Springbok*.²⁶ Among these there is none which applies the doctrine solely to blockade. Nor have any later cases, so far as has been found, so applied the doctrine. On this point Justice Elliott says:²⁷

The entire coast of the southern states was blockaded and every ship which attempted to carry contraband goods to the Confederate ports was necessarily guilty at some stage of the voyage of an attempt to run the blockade. Under these conditions the ships and cargoes might in some of the cases have been condemned upon either ground. The *Dolphin*, the *Hart* and the *Bermuda* were carrying contraband of war to a belligerent and were liable to condemnation without reference to the additional fact that it was necessary to run the blockade in order to deliver the cargo to the belligerents. The *Peterhof* and the *Springbok*

¹⁶ *James Cook* (1810), Edw. 261, *dictum*; *Imina* (1800), 3 C. Rob. 167.

¹⁷ *Yeaton v. Fry*, 5 Cranch 335.

¹⁸ *Twiss*, 3 Law. Mag. and Rev., 4th Series; Oppenheim, Int. Law; Phillimore, Int. Law; Halleck, Int. Law, etc.

¹⁹ This JOURNAL, 1:77 *et seq.*

²⁰ 7 Fed. Cas. 868.

²¹ 19 Fed. Cas. 54.

²² Blatchf. Prize Cas. 387.

²³ 2 Wall. 135.

²⁴ 3 Wall. 514.

²⁵ Blatchf. Prize Cas. 463; 5 Wall. 28.

²⁶ Blatchf. Prize Cas. 434.

²⁷ This JOURNAL 1:104.

were also carrying contraband and the cargoes were condemned and the ships released. As the doctrine of continuous voyages was properly applicable to the carriage of contraband goods the judgments entered in all these cases were correct regardless of the fact that the court included among the reasons for condemnation the additional fact that the vessels were engaged in blockade running.

An examination of the English cases, however, shows that the doctrine under discussion was considered in connection with cases of blockade half a century prior to the Civil War.

Of these cases, the earliest one mentioning the doctrine, which I have found in the English Reports, is the *Mercurius*.²⁸ The *Mercurius* was a vessel bound from Bordeaux to the blockaded port of Bremen *via* England, where she was to call for the purpose of obtaining a license to trade with the blockaded port. She was captured by an English ship during the anterior part of her voyage, that is, before she reached a British port. The court held that the voyage to the blockaded port was not continuous and that the vessel must be restored. Sir William Scott in delivering the judgment said (pp. 54, 55):

Then the question comes to this, whether such a voyage intended ultimately to Bremen, but first to this country, for the purpose of obtaining a license, without which it was to be relinquished, is a continuous voyage and therefore illegal? I think clearly not; it is a contingent voyage, depending upon the determination, not of the parties themselves, but of the British Government. * * * Where everything was to be disclosed and referred to the discretion of the British Government, the case can not be put on a footing with a continuous voyage framed for the mere purpose of a literal evasion. * * * I can not under any view of the case bring myself to regard it as a fraudulent continuous voyage; there has been no act either done or to be done to found the imputation of fraud; on the contrary, there is sufficient proof of an honest intention to come to this country to procure the license and to act conformably to it when granted, and I shall therefore restore on payment of captors' expenses.

He cites, without reference, the *Minna Traab*, as a similar case decided by him in 1807.

It will be observed that in the case of the *Mercurius* the subsisting

²⁸ *Mercurius* (1808), Edw. 53.

intent to commit a breach is lacking, and consequently that the case does not hold that the doctrine of continuous voyages is inconsistent with that of blockade, but on the contrary leaves the question open.

Somewhat previous to the case of the *Mercurius* the doctrine had been applied in a group of cases where an international boundary river had been blockaded and the neutral as well as the enemy ports on the river had been affected.²⁹ The question was whether goods bound from such neutral ports were condemnable for breach of blockade. The goods were shipped from the neutral ports in lighters which floated down beyond the circumvallation of the blockade and transshipped their cargoes in open ports to sea-going vessels which had come down in ballast. These vessels were captured en route to their destination and condemned on the ground that the transshipment was merely part of a continuous voyage. A further ground, and an all important one, though not especially emphasized in the cases, must have been the opportunity for fraud, the difficulty of its detection, and the ineffectiveness of the blockade, if trade with neutral ports on a blockaded river and in proximity to enemy ports on the same river were open to neutrals. Thus the idea of a continuous voyage from such an enemy port to a nearby neutral port thence down the river to the ultimate destination must, it would seem, have been in the contemplation of the courts creating the rule that a blockade of a boundary river affects both neutral and enemy ports situated on its banks, though the idea is not stated in so many words in the cases.³⁰

²⁹ *Maria* (1805), 6 C. Rob. 201; *Charlotte Sophia* (1806), 6 C. Rob. 204, note; *Lisette* (1806), 6 C. Rob. 394; Wheaton, Int. Law, Dana's ed., p. 689, note; Harcourt (Historicus), Pamphlet on Nassau Trade, 1863.

³⁰ The reverse of this group of cases arose during the Civil War in the famous case of the *Peterhof* (1866), 5 Wall. 28. This was the case of a cargo, partly composed of contraband goods, bound from London to the neutral port of Matamoros, situated opposite the Confederate town of Brownsville, and on the south bank of the Rio Grande river, which was under blockade by the Union fleet. She was captured south of Cuba, while *en route* for the Rio Grande river, and both ship and cargo were condemned in the lower court, but on appeal, the question of blockade being eliminated from the case, the United States Supreme Court restored the ship and condemned the cargo, on the ground of carrying contraband whose ultimate destination was Brownsville. This JOURNAL, 1:81, 82. Though, as we have seen, the connection between the doctrine of continuous voyages and

The first application of the doctrine of continuous voyages to contraband trade has, along with its application to blockade running, as stated above, been generally attributed to the United States during the War of the Rebellion, and some of the cases usually cited in support of this statement are those given above. Justice Elliott, however, has shown that French courts applied the doctrine during the Crimean War, the American courts during the Mexican War and at least recognized the doctrine even earlier in the case of the *Commercen*,³¹ and the English courts as early as 1803. The earliest case mentioned in which the doctrine was applied to contraband is that of the *Eagle*,³² decided in May, 1803, cited and commented upon in the case of the *William*³³ by Sir William Grant.³⁴

Search, however, has revealed statements of still earlier date which show that Lord Stowell believed the extension of the doctrine to contraband was not an innovation in the law of nations. The earliest instance of this sort which I have been able to find is a *dictum* in the case of the *Twende Brodre*.³⁵ This was the case of a Danish ship with a contraband cargo of ship-timber bound from Christiansand with an alternative destination to St. Maloes, a commercial port of France, or to Brest, the famous port of naval equipment. There was some question which was the intended destination of the cargo. The court decided that at time of capture it was the innocent port of St. Maloes, and partly on that ground restored the cargo. In the course of the judgment Sir William Scott said,

It could never be permitted to be averred that a cargo of this sort might go on an innocent destination to St. Maloes and then be sent to Brest or Rockfort. If that were the case it must be pronounced a case of condemnation.³⁶

blockade running appears to have been recognized long prior to the Civil War, still among all the English and American cases examined one has not been found in which the doctrine was directly and exclusively *applied* to a purely blockade case.

³¹ 1 Wheaton 382 (1816).

³² Not reported.

³³ 5 C. Rob. 395 (1806).

³⁴ This JOURNAL, 1:74, 75.

³⁵ 4 C. Rob. 33 (1801).

³⁶ *Twendo Brodre* (1801), 4 C. Rob. 33, at p. 38.

This suggests that in contraband trade, as we have seen is the case in blockade running, the intention as to the ultimate destination controls the character of the voyage. In other words, the intention at the time of capture decides the bad or good faith of the transaction and makes the cargo contraband or not, as the case may be.³⁷ Moreover, it would seem that the intention is that of the ship's master and not that of the cargo owners,³⁸ and that the intention in some instances is a matter of evidence to be presumed from certain facts.³⁹

The decision of Sir William Scott in the *Imina*⁴⁰ is often quoted in support of the proposition that goods are not contraband unless captured *in delicto*. The *Imina*, loaded with ship-timber, sailed for the belligerent port of Amsterdam, but when captured the master had changed her course to the neutral port of Embden without knowledge of the owners. The cargo was restored, Sir William Scott saying:

The rule respecting contraband, as I have always understood it, is that the articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port. Under the present understanding of the law of nations, you can not generally take the proceeds in the return voyage. From the moment of quitting port on a hostile destination, indeed, the offence is complete, and it is not necessary to wait till the goods are actually endeavouring to enter the enemy's port; but beyond that, if the goods are not taken *in delicto*, and in the actual prosecution of such a voyage, the penalty is not now generally held to attach. * * *

The cargo is taken on a voyage to a neutral port. To say that it is nevertheless exposed to condemnation, on account of the original destination as it stood in the mind of the owners, would be carrying the penalty of contraband further than it has been ever carried by this or the Superior Court. If the capture had been made a day before, that is, before the alteration of the course, it might have been different; but however the variation has happened, I am disposed to hold that the parties are entitled to the benefit of it; and that under that variation the question of contraband does not at all arise. I shall decree restitution.⁴¹

³⁷ *Franklin* (1810), 3 C. Rob. 217.

³⁸ *Imina*, *supra*.

³⁹ *Franklin* (1801), 3 C. Rob. 217. Intention, though apparently the controlling element in the offense, is not, however, alone sufficient. There must be an overt act, namely, the sailing for an enemy port. *Trende Sostre* (1807), 6 C. Rob. 391, note.

⁴⁰ *Imina* (1800), 3 C. Rob. 167.

⁴¹ Per Sir William Scott in *Imina*, *supra*.

The *Twende Brodre*, *supra*, might have added confirmatory weight to this opinion were it not for the quotation given above, from the judgment in that case. The decision in the *Imina* was rendered in the month of August, 1800, and that in the *Twende Brodre* by the same eminent judge scarcely twelve months later, namely, July, 1801. Moreover, as pointed out by Professor Westlake,⁴² the statement in the *Imina* was made with reference to the proposition that the proceeds can not be taken on the return voyage. It seems therefore either that Sir William Scott when delivering the judgment in the *Imina* did not believe that the proximate destination was decisive of the offense, or, that if he did, in 1801 he had changed his mind and was ready to apply the doctrine of continuous voyages to contraband if occasion arose. Consequently it would seem the *Imina* should not be taken as squarely contrary to the view that the intended final port decides the contraband character of the cargo.

A perusal of the earliest reports available⁴³ shows that forty years before the decisions of Lord Stowell in the *Imina* and *Twende Brodre*, the doctrine of continuous voyages appears to have been clearly in the minds of the English judges. This is shown by the case of the *Jesus*⁴⁴ (alias the *Jesus, Maria, and Joseph*), which arose out of the war of 1756, came before the Admiralty Court in 1756, and was appealed to the Lords of Appeal in 1759, being finally disposed of by the latter in 1761. The case is given below in full as reported:

A Spanish ship was taken in her voyage from Corunna to St. Sebastian, with a loading of coffee, saltpetre, dyewood, pepper, and India Bail goods, which was all on board from a French East India ship then lying there, by a Spaniard for account of a person resident at St. Sebastian to whom they were consigned. The cargo was claimed as the property of a Spanish subject, and likewise as laden on board a ship belonging to the King of Spain. The master on his examination said that the voyage on which he was taken was to have ended in France, and that he believed the lading belonged to French subjects, and that Spanish coasting vessels

⁴² Introduction to Takahashi's International Law during Chino-Japanese War, p. xx; quoted by Justice Elliott in this JOURNAL, 1:73.

⁴³ The Original Manuscript Books, *supra*; Burrell's Reports.

⁴⁴ Burrell 164.

were made use of to protect said goods from the English cruisers. Four other of the marines swore to the same effect.

27th Dec., 1756. — The Judge of the Admiralty pronounced just cause of seizure, and condemned the claimant in expenses, furthermore pronounced that the salt petre seized is in the nature of contraband, and condemned it as lawful prize to the captor; but pronounced that the ship and the rest of the goods belonged to the claimant, and directed the same to be restored, paying expenses. An appeal was interposed to which the respondent adhered, forasmuch as the Judge had not condemned the ship and all of the cargo as lawful prize.

15th July, 1759. — The Lords assigned the claimant to make proof that the ship and cargo were Spanish property, and that the ship when taken was bound from Corunna to St. Sebastian, and to no other port within two months. An allegation was accordingly given, and was examined 17th December, 1760. The Lords took time to deliberate till the first Court after the holidays.

5th September, 1761. — Respondent's proctor presented a petition desiring to withdraw his adhesion to the appeal, which he was permitted to do, and the Lord's affirmed the decrees of the Judge below and decreed the cause to be remitted.

The remaining two sorts of cases in which the doctrine has been applied, namely, where the subjects of one belligerent trade with the other belligerent, and where the subjects of a neutral carry on the coastwise or colonial trade of a belligerent, may be considered together under the head of enemy trade. It is in this sort of trade that we may find the birth of the doctrine of continuous voyages and trace its development into a well-settled rule. Indeed, the colonial trade of the enemy is supposed to have furnished the germ of the doctrine. In accordance with the well-known colonial policy of the eighteenth century, especially as practiced by France, colonies were considered to exist merely for the selfish exploitation of the mother country. Consequently she regarded it as an unfriendly act if other countries undertook to trade with her colonies. This being the case in time of peace, the famous Rule of the War of 1756 declared that such neutral trade with the colonies of the enemy in time of war was illegal.

Justice Elliott says:

In the closing years of the eighteenth century the British prize courts announced the general rule that a trade not open to neutrals in time of peace can not be pursued by them in time of war, and asserted that the principle had been applied as the basis for the condemnation of the

Dutch ships during the war of 1756. It is more probable that this famous doctrine was an afterthought and that it should be known as the rule of the war of 1793.⁴⁵

He adds that the "Discourse on the conduct of Great Britain with respect to Neutral Nations" by Jenkinson (Lord Liverpool) "was published in 1757, soon after the close of the war and is apparently the only contemporaneous assertion of the principle or rule of the war of 1756." To determine, therefore, whether the rule of war of 1756 is a misnomer is not without its difficulties. Duer states

that if any cases were to be found in the records of the English Admiralty prior to 1756, of the condemnation of neutral ships or their cargoes on the sole ground of their being engaged in the colonial trade of the enemy, they would certainly have been produced; but in the multiplied discussions to which the controversy has given rise, none such have been alleged. On the other hand, there is positive evidence that in the war of 1744 the trade of neutrals with the colonies of the enemy, France, was held to be lawful, since neutral ships taken on such voyages were released by the Lords of Appeal. In the case of the *Providentia*⁴⁶ this fact is stated by the counsel for the claimants, Drs. Arnold and Lawrence, and is not denied by the opposite counsel or by the court.⁴⁷

No cases are cited from the war of 1744 in support of this statement, and a search in the Original Manuscript Books of "Appeal cases in Prize Causes" for this war reveal no instances of this nature. It is believed, however, that these Manuscript Books do not contain a full report of all the cases arising in that war.

As to the use of the rule of the war of 1756 during that war, witness the several writers who have investigated the subject. Mr. Wheaton in his note on this question, without citing cases, says:

It can not be pretended that its origin can be traced in judicial records to an earlier source than that war from which it derives its name.⁴⁸

This statement is not inconsistent with that of Dr. Robinson:

that the war of 1756 was not the first instance in which the protection of the colonial trade of France, by the intervention of neutral privileges,

⁴⁵ This JOURNAL, 1:62.

⁴⁶ 2 C. Rob. 146.

⁴⁷ Duer, Mar. Ins., I, p. 763. See to same effect I Wheaton 514.

⁴⁸ 1 Wheaton 508.

had been made a device and stratagem of war, and that it was so far at least counteracted, in effect, by this country, in the preceding wars of that century, as to be immediately abandoned. The fluctuations of policy thus abruptly pursued by the enemy, will best explain how it may have happened that the principle did not assume its more distinct character prior to the war of 1756.⁴⁹

Dr. Robinson evidently was not writing in terms of judicial decisions, for the earliest cases cited in the note appear to have been decided in 1780. Duer states:

that in the war of 1756 neutral ships engaged in the colonial trade of the enemy, which had not been opened by any regulations, were condemned on the ground that by virtue of their employment, they became the adopted or naturalized vessels of the enemy.⁵⁰

He then proceeds to cite the cases given in and to quote from an article by Mr. Pinckney.⁵¹

Mr. Pinckney cites two cases, the *America* and the *Snip*, which he declares were decided "between 1757 and 1760," but no references are given. These are probably the earliest cases on record in which the rule of the war of 1756 was followed by the courts. The case of the *America* came before the High Court of Admiralty October 21, 1757, and reached the Lords of Appeal April 12, 1759. The *America* was a Dutch ship which had sailed in April 1756 (before war was declared by England against France, May 17 of that year), from Amsterdam for Port Prince, St. Domingo, a colony of France in the West Indies, where she sold her cargo, loaded another of the produce of the island and sailed back for Amsterdam. On the home voyage she was captured by a British ship. The decision of the Lords of Appeal, as written in long hand on the back of the brief of the appellant, reads thus:

Ship and cargo condemned. The Lords gave these particular reasons, viz., * * * that the ship *America* in question having been freighted on French account for and employed in a voyage to a port in St. Domingo, a French settlement in the West Indies, and having delivered her outward-bound cargo by allowance of the French Governor there,

⁴⁹ 6 C. Rob., note I, p. 112.

⁵⁰ Duer, Mar. Ins., I, p. 763.

⁵¹ 1 Wheaton 515, quoting Pinckney; also quoted in Duer, Mar. Ins., I, p. 764

and her homeward-bound cargo having been put on board after a survey subject to the ordinances and to the payment of duties ordinary and extraordinary and under penalties according to the laws of France, and the master having thrown overboard and destroyed the bills of lading and many other of the ship's papers, and the cargo laden and found on board being admitted to be the property of French subjects; declared that the said ship ought by law to be considered in this case as a French ship and therefore affirmed the sentence condemning the ship and goods as Prize.⁵²

The case of the *Snip* came before the lower court on the same day as the *America* and before the Lords of Appeal December 28, 1759. The *Snip*, also a Dutch ship, had sailed from Cork, Ireland, with a cargo, ostensibly for St. Eustatia, a Dutch settlement in the West Indies, but really had gone directly to Martinico, a French colony in the West Indies. There she made several trips with cargo between Martinico and St. Eustatia. Finally she took a cargo at Martinico, went to St. Eustatia, had her papers changed to read as if she had shipped her cargo at St. Eustatia, and set sail for Amsterdam, on which voyage she was captured by a British vessel. The opinion of the Lords, written in long hand as in the last case and not wholly legible, was as follows: •

The Lords * * * pronounced that the Ship de Snip in Question in this cause having been employed in a Voyage from Europe to Martinico and allowed to deliver her cargo there, and having had allowance at Martinico for her homeward voyage with a cargo laden by French subjects after paying the duty for the Domain and the fees for the Permit Secretary and Registering in the registry, and the papers introduced by the master being all colorable and false and the material sea papers on board have been industriously concealed by him in a bag of coffee, and there being no evidence in the preparatory depositions made (?) as to belief that the Props (?) of the cargo dont belong to the French Laders except with a reference to (?) the Instructions No. 3 which were unquestionably fraudulently (?) declared that the said ship ought by law to be considered in this case as a French ship and the cargo (?) as French property and therefore affirmed the sentence condemning the ship and goods as prize.⁵³

⁵² Original Manuscript Books of "Appeal Cases in Prize Causes," Wars of 1744, 1756, etc., in the Library of Congress, p. 18. Burrell, p. 210, does not give the decision *verbatim*.

⁵³ *Op. cit.*

In 1760 several cases of a similar sort came before the Lords of Appeal,⁵⁴ and many others subsequently.⁵⁵

In most of the cases given in the last note, a French pass or license to trade with the French colonies was obtained which was strong evidence of the ship's becoming for the time being "a French ship." But in some cases whether there was such a pass or not was indeterminate for the reason that the master threw overboard or otherwise destroyed the ship's papers as was done in the *America*. In other cases, however, there appears to have been no French pass, but as the papers were concealed, or forged, or the true destination otherwise dissembled, the cargo and ship were condemned.⁵⁶ On the contrary a few neutral ships bound to or from French colonial ports were restored on the ground that the evidence was insufficient to show the ship would be received or treated "only as French ships have a right to be treated;"⁵⁷ or that she was forced by bad weather to go into a French colony for repairs;⁵⁸ or that she was seized by a French privateer, carried into a French colonial port for adjudication and released there,⁵⁹ or apparently that she had practiced deceit on the French people themselves.⁶⁰ The case of *Notre Dame de la Rosa*,⁶¹ however, does not appear to fall in line with the previous cases. She was a Spanish ship taken in her voyage from Leogan, a French port in Hispanola, where she had taken on a cargo of sugar to Carthagená. She had last sailed from Carolina, a Spanish (?) port. Though there was on board a French permit from the officer at Leogan, nevertheless, the cargo and ship were restored. It would seem from the facts as reported that this case should be considered an anomaly among the decisions of this period.

⁵⁴ *Resolutie, Vriendschap, Den Amstel, Maria Agnes, Johanna Maria, De Hoop, Vryheid, Maria Johanna, Anna Elizabeth, Gloeyande Star, Juffrouw, Alida, Isaac, Vrouw Anna, Amsterdam, De Garaed, Gerechtigheit, Speedwell*, etc., *op. cit.*; also partially reported in Burrell.

⁵⁵ See Burrell 220.

⁵⁶ *Maria Agnes, Gloeyande Star, Isaac, Maria Johanna*, *op. cit.*

⁵⁷ *Good Christian* (1760), Burrell 216; *De Jonge Isaac* (1763), *op. cit.* 216.

⁵⁸ *Hope* (1764), Burrell 217.

⁵⁹ *Johanna Margretta* (1761), Burrell 218.

⁶⁰ *Vrouw Olara Magdalena* (1758), Original Manuscript Books, *supra*.

⁶¹ Burrell 217 (1760).

There also arose out of the trade with the French colonies in the West Indies during the war of 1756 another line of cases in which, stated generally, a neutral ship sailed for a neutral port in the West Indies where the cargo was either transshipped immediately, or landed and later shipped, on board another vessel for a French colony, or the return cargo was transshipped from barks just arrived from a French colony. The cases which arose from the subsequent capture of the vessels to which the cargo had been transshipped and which came on appeal before the Lords of Appeal from 1758 to March, 1761, were uniformly decided in favor of the claimants, that is, cargo and ship were restored.⁶²

The similar case of *Berens v. Rucker* arose before the Kings Bench in Trinity Term, 1761. A Dutch ship had taken on a cargo of sugar and indigo and other French commodities at St. Eustatia, a Dutch settlement in the West Indies, partly out of barks from sea and partly from the shore of the island, and was captured by an English privateer on her voyage to Amsterdam. The case came before this court on the question whether the underwriters on the policy of insurance should pay the expenses of a compromise between the owners and the captors to prevent the ship being condemned as prize, etc. Lord Mansfield, in delivering the opinion, used this clear language:

The first question is whether this was a just capture. * * * The capture was certainly unjust. The pretense was that part of this cargo was put on board off St. Eustatia out of barks supposed to come from the French islands, and not loaded immediately from the shore. This is now a settled point by the Lords of Appeal, to be the same thing as if they had been landed on the Dutch shore and then put on board afterwards; in which case there is no color for seizure. The rule is, that if a neutral ship trades to a French colony, with all the privileges of a French ship, and is thus adopted and naturalized, it must be looked upon as a French ship, and is liable to be taken. Not so, if she has only French produce on board, without taking it in at a French port; for it may be purchased of neutrals.⁶³

⁶² *St. Juan Baptista* (1758), Original Manuscripts Books, *supra*; *Maria Theresa* (1759), Burrell 204; *Novum Aratrum* (1759), Burrell 205; *De Johanna Arnoldina* (1759), Original Manuscripts Books, *supra*; *Helena* (1761), Burrell 223. See also *Jesus* (1761), Burrell 164.

⁶³ 1 W. Black. 313; cited in 1 Wheaton 521. Subsequently in *Brymer v. Atkins*, (1789) 1 H. Black, 191, Lord Loughborough incidentally and briefly

Thus up to the middle of 1761 the doctrine of continuous voyages would seem not to have been applied to this sort of circuitous evasion of the rule of the war of 1756.

Just when the doctrine originated and was first followed by the courts has been a matter of doubt not only among writers on the subject, but among the courts as well.

As the famous cases on the doctrine of continuous voyages, which arose at the beginning of the nineteenth century, and which were argued before both the High Court of Admiralty and the Lords of Appeal in England, make little or no mention as precedents of earlier instances in which the doctrine was laid down, these cases have generally been regarded as the leading ones on the subject; and as Lord Stowell (Sir William Scott) rendered the decisions in most of these cases before the High Court of Admiralty, he has commonly been granted the honor of originating the doctrine.

Thus Justice Elliott, in his most able article, states:

It has been claimed that the theory of continuous voyage was first suggested by James Stephen in the celebrated pamphlet, entitled *War in Disguise* (Leslie Stephen, *Life of J. F. Stephen* p. 19). This publication undoubtedly had some influence upon the conduct of Great Britain but it was not published until 1805, and the theory of continuous voyages was applied by Sir William Scott as early as the year 1800.⁶⁴

A similar reference to Sir William Scott was made by Twiss, writing in 1877 and criticising the American application of the doctrine to cases of blockade and contraband:

reviewed the history of the rule of the war of 1756. This rule was always strongly opposed by America both on the ground of principle and on the ground of its apparent abandonment by England during the American Revolution and the contemporaneous war with France. Writers, however, appear to disagree on whether the rule was actually abandoned at that time. Dr. Robinson and Mr. Pinckney believe it was abandoned, the former on the theory that the French had by official order thrown open their colonial trade to neutrals generally, the latter on the decisions of the Lords of Appeal in the *Tiger* and the *Copenhagen* in 1782. (1 Wheaton 525 *et seq.*) Wheaton, on the other hand, quotes from Pinckney and adds that the official order is not extant and that the House of Lords applied the rule in the case of the *Katharina* in 1783. Duer agrees with Wheaton (1 Mar. Ins. 765).

⁶⁴ This JOURNAL, 1:68.

The parent stock on which Lord Stowell's doctrine was grafted was known in the language of the English Prize Courts as "the Rule of the War of 1756" under which it was held that it was inconsistent with neutrality for the subject of a neutral state to interfere in time of war in a trade between a belligerent state and its colonies where the neutral was forbidden by the laws of the belligerent state to take any part in such trade in time of peace. * * * It was to meet this novel form of neutral adventure in aid of one enemy's trade and to prevent the produce of one enemy's colony from being imported into the mother country or vice versa through an apparently legitimate channel which was in fact a counterfeit, that Lord Stowell took upon himself to invent the doctrine, as it has been termed, of continuous voyages, and clothed it in language which has enabled the Prize Courts of the United States to apply it with plausibility to a very different class of cases.⁶⁵

Christopher Robinson, in a note written in 1808 and appended to the famous admiralty reports of which he was editor, uses this language:

There is one other remark which the editor takes the opportunity of introducing here as connected with that branch of the colonial principle which relates to continuous voyages. It is merely to point out to those who may have occasion to observe the manner in which that extension has grown out of the original principle, a circumstance which appears to have hitherto escaped notice, viz., that it was in the *first* instance adopted as a rule of equitable construction in favor of neutral trade, in protection of that part of a cargo which had gone from Hamburg [neutral] to Bordeaux [enemy] and was afterwards captured on the ulterior part of the voyage to St. Domingo.⁶⁶

This he says was the case of the *Immanuel*,⁶⁷ a neutral ship which touched at Bordeaux, where entry was made and forms of exportation of the cargo were gone through. The ship was captured between Bordeaux and St. Domingo and the captor contended that the trade was illegal as between two enemy ports. The cargo, however, was restored on the ground that the entry and forms of exportation did not create such an incorporation of the goods with the commerce of France as would render the transaction a trading between French ports only. Sir William Scott said (p. 197):

⁶⁵ 3 Law Mag. and Rev. (4th S.), pp. 1-13.

⁶⁶ 6 C. Rob., Appendix, note II.

⁶⁷ 2 C. Rob. 186 (1800).

I incline to think that this would be much too rigorous an application of the principles rather belonging to the revenue law of this kingdom, a system of law having little in common with the general Prize law of nations; and that these goods are entitled to be considered as coming from Hamburg, the original place of their shipment; and former decisions having fully established that a *direct* commerce from a neutral country to a French settlement was open, I decree restitution of these goods which all appear to be neutral property.

In the various discussions of the doctrine of continuous voyages by writers both in magazines and text-books on international law, the statement may be found that the doctrine is an outgrowth of the "Rule of the War of 1756," but the leading cases cited, if at all, are: the *Immanuel*, *supra*, the *Polly*,⁶⁸ the *Maria*,⁶⁹ the *William*,⁷⁰ and in some instances the *Thomyris*⁷¹ is also added.⁷² Sir William Scott was judge of the High Court of Admiralty throughout the period covered by these cases and sat in all of them except the *William*.

The *William*, *supra*, was the case of a ship and cargo en route from La Guira, a colony of Spain, to Bilboa, Spain. The ship put in at Marblehead, Mass., landed her cargo, reshipped it again after the duties had been paid agreeably to law, and proceeded on her voyage to Bilboa. She was captured by a British vessel and condemned in the Vice-Admiralty Court at Halifax. The case was brought on appeal to the Lords Commissioners of Appeal in Prize Cases, which is the court of last resort. The case was argued by

⁶⁸ 2 C. Rob. 361 (1800).

⁶⁹ 5 C. Rob. 365 (1805).

⁷⁰ 5 C. Rob. 385 (1806).

⁷¹ Edw. 17 (1808).

⁷² Upton, *Law of Nations*, 1863; Chitty, *Law of Nations*, 1812; Hazelitt and Roche, *Law of Nations*, 1854; Wheaton, *Law of Nations*, Dana's ed., 1866; Westlake, *International Law*, 1907; Hall, *International Law*, 1895; Woolsey, *International Law*, 1891; Kent's *Commentaries*, vol. I, p. 84; Halleck, *International Law*, ed. by Sir Sherston Baker; Oppenheim, *International Law*; Phillimore, *International Law*. Other authorities consulted scarcely more than mention the doctrine, if indeed they do so much: Pratt, *Story on Prize Courts*, 1854; Lushington, *Naval Prize Law*, 1866; Maine, *International Law*, 1888; Holland, *Studies in International Law*; Roberts, *Admiralty and Prize*; Holland, *Prize Law*; Baty, *International Law*; Wildman, *International Law*, etc.

the King's Advocate and the Attorney-General for the captor, and by Mr. Dallas and Dr. Arnold on the part of the appellant. Before this learned body we may be assured that all of the precedents *pro* and *con* were brought forth by the eminent counsel in support of their arguments. Though the precedents thus cited were presumably those bearing on the question what is such importation as will break the continuity of a voyage, still the good faith of such intermediate importation is just the question most frequently to be decided in cases of continuous voyages. In reviewing the previous cases, Sir William Grant, delivering the opinion of their Lordships, said (p. 399 *et seq.*):

The first case of the kind, that of the *Polly*, occurred in the High Court of Admiralty [before Sir William Scott] in Feb. 1800 * * * The first case of this class which I believe came before this board [Lords of Appeal] was that of the *Mercury*,⁷³ in January 1802 * * * The next case which occurred was that of the *Eagle*⁷⁴ in May 1803.

Then the schooner *Freeport*⁷⁵ came on in August, 1803, and the *Essex*⁷⁶ in August, 1803, and May and June, 1805.

By comparing the case of the *William*, just reviewed, with that of the *Maria*⁷⁴ some confusion as to the leading cases on the theory of continuous voyages seems apparent. The *Maria* was an American vessel with a cargo of colonial produce from Havana. She entered New Providence where she remained about seven weeks and then continued her voyage to Amsterdam, during which she was taken by a British vessel. In delivering the judgment, Sir William Scott said (p. 368 *et seq.*):

In the case of the *Essex*⁷⁶ which was decided by the Court of Appeal, the principle of law, by which such cases are to be decided was distinctly affirmed. It certainly is not a novel principle; and I cannot but express my surprise that it should be represented in any place, as I understand it has been, that the principle is new. * * * The *Essex* was in fact the first case which called for the direct decision of the Superior Court; but the same doctrine would have been held in any other case, if such a case had occurred at an earlier period; and cases had occurred before,

⁷³ Not reported.

⁷⁴ 5 C. Rob. 365 (1805).

⁷⁵ Not reported.

very sufficient to convey a full admonition upon the subject. As the *Essex*, however, happened to be the leading case on the subject it may not be improper that I should state what I conceive to be substance of it. * * * The first case that called for the decision of this court was that of the *Enoch*.⁷⁶ * * * The next was the *Rowena*⁷⁶ which happened on the same day. * * * Soon after came the case of the *Respect*.⁷⁷ * * * These are the principal cases which have occurred in this Court without adverting to those that have occurred in the Superior Court.

Thus, Sir William Scott states that the principle of continuous voyages is not new, and intimates that there were, prior to the *Essex*, cases foreshadowing the doctrine. None, however, are cited, and the *Essex* (1805) is declared the earliest case for direct decision before the Lords of Appeal and the *Enoch* (1805) the first case in Sir William Scott's Court. In the *William*, on the other hand, the *Mercury* (1802) is declared by Sir William Grant the first case before the Lords of Appeal and the *Polly* (1800) the leading case in the High Court of Admiralty. No mention is made of the *Immanuel* (1800), which, like the *Polly* (1800), cites no earlier cases. The remaining cases cited above in the *William* and the *Maria* have not been reported. The other cases⁷⁸ involving the doctrine of continuous voyages throw no further light on the history and origin of the theory. It is evident, therefore, that jurists have had considerable authority for their statements as to the origin of the doctrine under discussion. Search, however, through the cases arising from the wars of 1744, 1756, 1762, etc., bears out the intimation of Sir William Scott in the quotation above from the *Maria* that the doctrine of continuity of voyages had been earlier applied by the British courts. Yet, as we have seen above, the doctrine would seem not to have been applied to the rule of the war of 1756 down to the middle of 1761. In the years 1762 and 1763, however, the cases of the *Africa* and the *St. Croix*, arising out of the war of 1756, came

⁷⁶ Admiralty, 23 July, 1805; not reported.

⁷⁷ Admiralty, Aug. 1, 1805; not reported.

⁷⁸ *Thomyris* (1808), Edw. 17; *Jonge Pieter* (1801), 4 C. Rob. 79; see also *Minerva* (1801), 3 C. Rob. 229; *Wasser Hundt* (1810), 1 Dods. 271, note; *La Flora* (1805), 6 C. Rob. 1; *Argo* (1854), Spinks 52.

before the Lords of Appeal, who appear to have applied the doctrine of continuous voyages to them.⁷⁹ The cases follow:

THE AFRICA

A British ship sailed from New London in North America to Barbados, with a cargo of provisions and lumber, which she there unladed and took on board 10 negro slaves and £700 Barbados currency in cash, with which cleared for Guadaloupe, but sailed to Monte Christi, where she arrived in February, 1760, and in her return was taken by an English man-of-war. The master in his deposition said there was laden on board his ship at Monte Christi 170 or 180 hogsheads of molasses, and there was on board his ship when he sailed from Barbados several empty casks for molasses, which were put on board two sloops at Monte Christi, which sailed thence for some French port, as he believes, when they were filled with molasses, and brought back to Monte Christi and received on board said ship. There was a receipt signed by Francisco Solano, said to be an inhabitant of Monte Christi, acknowledging the captain had paid him the amount of 140 casks of molasses which he had bought of him there; also a certificate from the Governor that said molasses had been bought by the captain of inhabitants of Monte Christi. A claim was given for ship and cargo as the property of a British subject in North America. The Judge of the Vice-Admiralty at Jamaica condemned ship and cargo as Prize.

13th July, 1762. — On appeal, the Lords affirmed the sentence of the Judge below, and decreed the cause to be remitted.⁸⁰

THE ST. CROIX

The St. Croix, laden with sugar, was taken on her voyage from Monte Christi by an English privateer, and carried into New Providence. Claim was given by the master for ship and cargo as property of subjects of the King of Denmark resident at St. Croix. The witnesses examined said that the ship sailed from St. Croix, cleared out for Monte Christi; that Bodkin, one of the owners of the ship and cargo, arrived at Monte Christi a few days after; that they brought about 180 negroes from St. Croix; about 10 were sold at Monte Christi, the rest were sent to Cape Francois with part of the outward cargo, consisting of beer, wine, and dry goods. That Bodkin went with the slaves and cargo to Cape Francois and there employed a Frenchman to dispose of them, to whom he paid 7 per cent. on the sale whilst the ship lay at Monte Christi. She took in her present cargo at Monte Christi, consisting of 490 hogsheads

⁷⁹ Burrell, 229, lists other cases to the same purpose from 1763 to 1765, but these may have been affected by the declaration of war by England against Spain, Jan. 2, 1762.

⁸⁰ Burrell, 228.

of sugar, which came out of barques which brought them from Cape Francois, which the witnesses believed the return for the cargo sent thither. There was on board a certificate from the Governor of Monte Christi, that the cargo was bought from inhabitants of that city.

13th April, 1761. — The Judge of the Vice-Admiralty at New Providence condemned ship and cargo to the captor.

5th March, 1763. — On appeal the Lords affirmed the sentence, and decreed the cause to be remitted.⁸⁰

While these two cases were being considered and decided by the Lords of Appeal, they had at the same time under deliberation the case of the *Yong Vrow Adriana*.⁸¹ This case also arose out of the war of 1756, was decided by the Vice-Admiralty Court at Gibraltar in 1758 and carried before the Lords of Appeal in England in 1764. The main part of the case is reprinted here as reported:

A Dutch [neutral] ship was put up at general freight at Cadiz [neutral] and took on board a cargo of coffee, sugar, indigo, cochineal, wool, and other merchandise, great part of which was brought from two French ships then lying in the bay. There were 157 bills of lading on board, signed as well by the captain as the owners of the goods, and all declared the goods shipped for the account and at the risk of subjects of the King of Spain and other neutrals. There was likewise on board an affidavit of thirty persons, attested by a notary, that the goods on board the said ship, being the whole cargo, belonged entirely to the declarants, and that no other person had any concern therein. The master and mariners swore that they knew no more of the property of the cargo than the bills of lading and manifest showed. 2nd. May, 1758. The ship was taken by the *Nelly's Resolution*, privateer, within a mile of the port of Cadiz, and carried into Gibraltar. After the capture several further affidavits of their property in the cargo were made by the owners at Cadiz and transmitted to Gibraltar.

15th July, 1758. — The Judge of the Vice-Admiralty at Gibraltar restored the ship as the property of subjects of the States General, pronounced that some part of the cargo specified and money, were not liable to confiscation, and decreed them to be restored to the claimants; but condemned the rest of the cargo, consisting of West India produce. The captors acquiesced in the restitution of the ship, and paid the captain his freight.

26th July, 1758. — Nicholas Tardy, on behalf of himself and the several claimants, appealed from that part of the sentence condemning the rest of the goods. * * *

27th June, 1761. — The Lords having heard informations in the cause, and respondents having made many objections to the credibility of a real

⁸¹ Burrell, 178.

sale at Cadiz of a cargo going to Marseilles, the place of its first destination, to be delivered to the original consignees, as appeared manifestly in many instances; and alleging that by the law of Spain and France the goods must have been cleared out and transboarded, and have paid the duty at Cadiz, and must have entered at Marseilles as continuing French property, and also urging that the oaths of support of the claims are evasive; and the appellant's insisting that neither the law of Spain nor France was as alleged, and averring that no evasion was intended nor could fairly be insinuated from the oaths in support of the claim; their Lordships thought it reasonable that some opportunity should be given for further explanation by affidavits as to the laws and practice of Spain in relation to transboarding goods from French to neutral ships, and as to the laws and practice of France in relation to the importation of the produce of French settlements in America into France on board a neutral bottom from a port in Europe; and that the claimants should be at liberty to supply the oaths and depositions already made by declaring whether the property was to continue theirs after the arrival and delivery of the goods at Marseilles, and likewise to supply the defect in their oaths by declaring that the price was actually and bona fide paid to the original proprietors, and how and where.

In obedience to their Lordships order, affidavits and proofs respecting the laws of France and Spain were given in on both sides, and on 30th June, 1764, the matter came on again, when the Lords declared, from the evidence on both sides, that the transboarding on this occasion was not done in any fair course of trade or commerce, which ever did, or ever can exist in time of peace, but was a fraudulent contrivance merely on account of the war to continue the original voyage and cover the *goods* of the *enemy* to their destined port, entitled to the same privileges and liable to the same duties and consequences as if they had arrived on board the same ship on which they were first laden, and therefore an actual sale for a consideration really paid ought not to be allowed to screen, but ought to be considered merely as a mode of unfair assistance to complete the original voyage in favor of the original proprietors, the original consequences, and the public revenue of the enemy arising from the duties.

As a general conclusion from the discussion in this paper it may perhaps be said that the controlling element running through the early cases of direct breach of the rules of enemy trade, contraband, or blockade appears to be that of intention, and that the same element runs through early cases of indirect breach, that is, cases in which the doctrine of continuous voyages has been applied or discussed. Which is the port really intended as the destination? What is the intention of the ship's master, not of her distant owners? These are the inquiries to be answered in each case, and the answers are to be derived

from all of the attending circumstances, perhaps to be presumed conclusively from certain combinations of facts. It also appears that the doctrine of continuous voyages in connection with blockade running, contraband carriage, and enemy trade was a British doctrine known to the English judges and more or less frequently applied by them almost before America became known as a nation, the early cases on blockade dating back to 1805 and 1808, those on contraband to about 1761, and those on enemy trade to 1762 or 1764.

LESTER H. WOOLSEY.

CHINA AND THE POWERS SINCE THE BOXER MOVEMENT.

Ten years ago, on the 14th of August, the Dowager-Empress, with the entire Imperial Court, fled from Peking. The victorious army of the allied foreign powers was left in control. This was the culmination of a series of national humiliations that humbled China's proud spirit to the dust and finally broke down the resistance which had for centuries withstood the efforts of Western civilization to gain an entrance.

"Better fifty years of Europe than a cycle of Cathay," wrote Tennyson less than a century ago. With almost equal truthfulness he might have written a decade ago. But in the ten years that have followed, more numerous and more momentous changes have taken place than had occurred in twice as many preceding centuries. Could the Sage, Confucius, have returned a decade ago he would have felt almost as much at home, — so far as social, political and economic institutions are concerned, — as when he departed twenty-five centuries before. Should he return a decade hence he would feel as much out of place as Rip Van Winkle, if the recent rate of progress continues and projected reforms are carried out. "A nation in a day" was the phrase used to describe the marvelous transformation of Japan in the last *half* of the nineteenth century. What will be used to describe the similar feat which China bids fair to accomplish in the first *quarter* of the twentieth?

It is only with the last ten years that this paper has properly to do; and it is chiefly concerned with the international complications arising out of the Chinese situation. But since most of the events of the last decade had their beginning earlier, it is necessary to rehearse at some length, by way of introduction, matters of an international character that had occurred in the few preceding years.¹

¹ The writer lays little claim to originality. His purpose has been to digest and condense into convenient form and compass matters of common knowledge but not easily accessible. His chief sources are those open to all, the Annual

FOREIGN AGGRESSION BEFORE THE BOXER MOVEMENT.

The war which Japan forced upon and so triumphantly prosecuted against China in 1894 and 1895 revealed the pitiable weakness of the latter and the dangerous strength and ambitious designs of the former. By the Treaty of Shimonoseki,² besides a large indemnity and other humiliating concessions, China was compelled to cede to her land-hungry conqueror the large island of Formosa, with several smaller adjacent; and what was far worse and, for this study, far more important, she gave up also the Liaotung peninsula including the important stronghold of Port Arthur commanding the entrance to the Chinese capital and affording a foothold for further aggression; she also recognized the "full and complete independence and autonomy of Korea," thus losing the sovereignty, shadowy and uncertain at times, but still important, over the hermit kingdom and abandoning the latter to the tender mercies of Japan, whose designs were patent though, of course, not mentioned in the treaty.³

But the victor was not permitted to enjoy all the fruits of his victory. A highwayman never knows how much of his booty is his own till he has shared with other highwaymen and made his peace with the chief of the bandits. Russia was the power whose exploits had won for it that eminent position in this part of the forest. With the support of France and Germany, Russia remonstrated against the cession of territory on the mainland since the possession

Register, International Year Book, and London Spectator, with less use of other periodicals and magazines. Frequent use has been made of official documents contained in Hertslet's China Treaties; Rockhill's Treaties and Conventions with China and Korea, and his Report on Affairs in China in 1900 and 1901. No use has been made, as could most profitably have been, had time and space permitted, of the volumes of diplomatic correspondence contained in Foreign Relations of the United States, British Blue Books, and other similar publications. The flood of more or less popular China literature that has been flowing from the presses of all countries has scarcely been touched. Very few references are given except to official documents.

² Printed in SUPPLEMENT, 1:378.

³ Hertslet's, China Treaties, I:362; Rockhill, Treaties and Conventions, 14.

of Port Arthur by any foreign power would be a constant menace to Peking and prejudice the rights of other powers. "In the interests of permanent peace" the three advised Japan to relinquish the territory in question. England had refused to join the other three in compelling Japan to disgorge but declined to help her resist and even advised her to yield. In consideration of a large addition to the already heavy indemnity Japan retroceded the Liaotung peninsula after a tenure of only seven months.⁴

With true bandit chivalry Russia posed as the friendly protector of the poor and the weak. To help pay the enormous debt to Japan she guaranteed a loan from French capitalists and pressed it upon China, who it is said would have preferred to borrow in the open market had the generosity of her benefactor and her benefactor's wealthy friends been less urgent. In view of this it would have been unkind for China to withhold such humble comfort as her warm hearthstone could afford. Late in 1897, as cold weather approached, Russian ships of war steamed into the harbor of Port Arthur under an agreement that they should be allowed to winter there in order to escape the rigor of the cold at Vladivostok, and to be better able, as China was persuaded, to come to the latter's help in case of need. Japan, alarmed, was assured that they would return to the north with the coming of spring. Two English ships followed and lay quietly in the harbor to watch. To Russia's indignant inquiry Lord Salisbury responded by withdrawing the British vessels. During the winter the Russian Chargé Pavloff and the Grand Secretary Li Hung Chang reached the following friendly agreement, signed March 27, 1898:

For the protection of the Russian fleet, and (to enable it) to have a secure base on the north coast of China, His Majesty the Emperor of China agrees to lease to Russia Port Arthur, Taliénwan, and the adjacent waters. But this lease is to be without prejudice to China's authority (sovereignty) in that territory. * * * The term of the lease is fixed at twenty-five years from the date of signature. On expiration an extension of the term may be arranged between the two countries.

⁴ Hertslet, I:370; Rockhill, *Treaties, etc.*, 26; SUPPLEMENT, 1:384.

Besides many subsidiary matters it was also arranged that Talienwan should be the terminus of a branch line through southern Manchuria from the main line of the Trans-Siberian Railway.⁵

By April 1 the Chinese garrisons were withdrawn from Port Arthur and Talienwan, the Russian flag was flying at both, nine Russian ships were in the harbors and two thousand troops had been landed. But before this arrangement had been concluded, another of the bandit powers that had three years previously rescued China and compelled Japan to divide up had secured her "compensation" from the helpless victim. Ostensibly, at least, Germany had a separate grievance to justify her seizure. Two missionaries from that country had been killed in Shantung in 1897. This fortunately afforded a religious cloak to cover the shame of her rapacity. She demanded an indemnity for the heirs and dependents of the victims, punishment of the murderers, and degradation of the governor of Shantung whose laxness had permitted the outrage. To enforce her demands, and with the connivance of Russia, a body of marines was landed at Kiao-Chou and the German flag was raised. The Chinese garrison retreated. Negotiations were opened for a peaceable settlement. Prince Henry, in the battleship *Deutschland*, left Kiel in December and reached Kiao-Chou in April with instructions from his brother, the Kaiser, to strike with the "Mailed Fist" if necessary. But it was not necessary. The German Minister and the Tsung-li Yamen had on March 6, 1898, agreed that:

The incidents connected with the Mission in the Prefecture of Tsao-chou-foo, in Shantung, being now closed, the Imperial Chinese Government consider it advisable to give a special proof of their grateful appreciation of the friendship shown to them by Germany. * * * With the intention of meeting the legitimate desire of His Majesty the German Emperor, that Germany, like other powers should hold a place on the Chinese coast for the repair and equipment of her ships, for the storage of materials and provisions for the same, and for other arrangements connected therewith, His Majesty the Emperor of China cedes to Germany on lease, provisionally for ninety-nine years, both sides of the entrance to the Bay of Kiao-Chou.

⁵ Hertslet, I:505; Rockhill, *Treaties, etc.*, 50; SUPPLEMENT, p. 289. The important railway concessions here mentioned will be discussed below under the topic, Manchuria.

"To avoid the possibility of conflicts," the Chinese Emperor agreed, "while reserving to himself all the rights of sovereignty," to leave the exercise of the same to Germany within a radius of some thirty miles. Many profitable railway, mining, and other concessions were also secured.⁶

A few weeks later the third of the magnanimous bandits who had delivered China from the heartless Japanese robber concluded an agreement for reward, which, however, was not ratified by China till nearly two years later. The French lease was far away on the southern coast within easy reach of her earlier and much more extensive seizures of Chinese vassal states in Farther-India. This time she took only Kwang-Chou-wan Bay with a square of the surrounding land about thirty miles each way. It was leased for the same period as Germany's bay in Shangtung and for the same purpose, that is, a naval base. It included also an agreement for a railway from Tonking into Yunnan, and other matters.⁷

As in the case with Germany, so also did France have a religious pretext. A French priest had been murdered, and, further, a French engineer had been kidnapped. Indemnity, punishment of the culprits, and deposition of the responsible authorities were exacted.

Although Great Britain had not assisted in compelling Japan to disgorge, she had kindly advised that power to do so. English policy, ostensibly at least, was not to annex Chinese territory, but as rapidly as possible to open the ports of the country to British trade and to that of all the world as well. Fifty years earlier she had seized Hong-Kong which she held in perpetual full sovereignty. But now when she saw other powers obtaining leases she could not

⁶ Hertslet, I:350; Rockhill, *Treaties, etc.*, 45; SUPPLEMENT, p. 285.

⁷ Art I. "Le Gouvernement chinois, en raison de son amitié pour la France, a donné à bail pour 99 ans Kouang-tcheou-ouan au Gouvernement français pour y établir une station navale avec dépôt de charbon, mais il reste entendu que cette location n'affectera pas le droits de souveraineté de la Chine sur le territoires cédés." Understanding reached by exchange of notes April 9 and 10, 1898; negotiations completed May 27; and ratified by China Jan. 5, 1900. Hertslet, I:329; translated in Rockhill, *Treaties, etc.*, 55. Text of convention in SUPPLEMENT, p. 293.

refrain from asking the same. On July 1, 1898, she concluded a convention for a lease of the Bay of Wei-hai-wei opposite Port Arthur with the agreement that she should retain the former as long as Russia should hold the latter. This was "to provide Great Britain with a suitable naval harbor in North China, and for the better protection of British commerce in the neighboring seas."⁸ On June 9, preceding, England had also obtained by lease for ninety-nine years a considerable extension of her territory of Hong-Kong in the shape of a neighboring peninsula and several islands.⁹

Italy tried in 1899, with British support, to obtain a lease of Samsum Bay on the coast of Chekiang. Italian marines were landed, and the Italian ministry sent an ultimatum. But China plucked up courage to resist, and Italy concluded to disavow the acts of her agents. A little more than a decade before, China had ceded to Portugal in perpetual sovereignty the island of Macao which had been possessed by that country for more than three centuries but for which she had paid a rental most of the time.

In the treaty ports, already numerous and constantly increasing in number, China had yielded foreign concessions; and was permitting foreigners to exercise legal jurisdiction even over Chinese subjects by allowing claims of extraterritoriality. Foreign missionaries were always pushing further and further into the forbidden territory; and their respective governments were successfully interfering to protect them or if that failed to exact costly penalties.

Foreign ideas were even invading the court and winning adherents in the palace; as early as 1895 a petition from South China prayed the Emperor to introduce constitutional reform, remove incapable officials, abolish the pigtail and foot-binding, and allow freedom of speech and the press. The startling news that the Emperor himself was a convert and was surrounding himself with foreign educated men desirous of adopting foreign customs was followed by a flood of reform edicts in 1898. The leader among the reform faction letting his zeal get the better of his discretion, proposed

⁸ Hertslet, I:122; Rockhill, *Treaties, etc.*, 60; text in SUPPLEMENT, p. 297.

⁹ Hertslet, I:422, 423; Rockhill, 58; text in SUPPLEMENT, p. 295.

to memorialize the throne advising the abolition of the queue, the adoption of European dress, the promotion of Christianity, and the establishment of a national parliament. The reactionary high officials, still a large majority, tried to induce the Emperor to dismiss the few reforming secretaries. Instead, they themselves were dismissed and their rivals promoted.

As a last resource, the reactionaries implored the old Dowager-Empress, for the sake of the dynasty and the country, to resume the reins of government which she had handed over to the Emperor nine years earlier, after having been the regent and ruler almost continuously for twenty-eight years. The Emperor attempted a *contre-coup*, but the agent to whom he intrusted the task of arresting the Dowager-Empress betrayed his trust and played into the hands of the reactionaries. The old regent acted quickly, put the reforming Emperor back into leading strings, and resumed the power. This relation continued for a decade until the almost simultaneous death of the aged regent and the puppet sovereign.

The *coup-d'etat* was complete. Six of the leading reformers were beheaded. Corrupt reactionary officials returned to their places rejoicing. Riots broke out and insults to foreigners were multiplied. Six foreign powers ordered military escorts to Peking to protect the legations. The year 1899 was one of suspense and uncertainty. The European press predicted the break up of China. In debates in foreign parliaments the impending partition was freely discussed. The leases of the preceding year had established spheres of influence that might serve as bases for occupation. In November the Empress-Dowager appealed to the viceroys and governors to resist all further aggressions of foreign powers. It was this that foiled Italy's attempt. The regent furthermore exhorted the people to act *en masse* and "preserve their ancestral homes and graves from the ruthless hands of the invader."

ANTI-FOREIGN WAR — BOXER MOVEMENT.

The charge was ready. It needed but the spark to produce the explosion. The fiery old Empress supplied that. Many patriotic societies existed. The most formidable was the "Righteous

Harmony of Fists," dubbed "Boxers" by foreigners. Its idea was that righteousness must be upheld by force if necessary. Its chief purpose was to drive out foreigners and their religion. It spread rapidly until it became uncontrollable, even if the government had wished to suppress it. Some viceroys on their own responsibility combated it. The Dowager-Empress pretended to resist but secretly encouraged it. The result was the terrible summer of 1900, with its tragic events which culminated in the entrance of the allied armies into Peking and the flight of the Imperial Court on August 14. Omitting the military details and harrowing experiences connected with the siege of the legations and the march of the allied armies to their relief; and only alluding to the more than two hundred foreign missionaries and the multitudes of native Christians who heroically suffered martyrdom rather than renounce their faith, thus proving their sincerity; the following quotation from an official document gives a sober unimpassioned account of the events of international importance:

During the months of May, June, July and August of the present year serious disturbances broke out in the northern provinces of China and crimes unprecedented in human history — crimes against the law of nations, against the laws of humanity, and against civilization — were committed under peculiarly odious circumstances. The principal of these crimes are the following:

1. On the 20th of June His Excellency, Baron von Ketteler, German Minister, proceeding to the Tsungli Yamen, was murdered while in the exercise of his official duties by soldiers of the regular army, acting under orders from their chiefs.

2. The same day the foreign legations were attacked and besieged. These attacks continued without intermission until the 14th of August, on which date the arrival of foreign troops put an end to them. These attacks were made by regular troops who joined the Boxers, and who obeyed orders of the court, emanating from the Imperial palace. At the same time the Chinese Government officially declared by its representatives abroad that it guaranteed the security of the legations.

3. The 11th of June Mr. Sugiyama, Chancellor of the Legation of Japan, in the discharge of an official mission was killed by regulars at the gates of the city. At Peking and in several provinces foreigners were murdered, tortured or attacked by Boxers and regular troops, and only owed their safety to their determined resistance. Their establishments were pillaged and destroyed.

4. Foreign cemeteries, at Peking, especially, were desecrated, the

graves opened, the remains scattered abroad. These events led the foreign Powers to send their troops to China in order to protect the lives of their representatives and their nationals, and to restore order. During their march to Peking the Allied Forces met with the resistance of the Chinese Armies and had to overcome it by force.¹⁰

For thirteen months, while negotiations were in progress for a settlement, the Chinese capital was occupied by the allied troops under the German Commander-in-Chief, von Waldersee, and China was virtually ruled by the foreign powers. There were many small punitive expeditions to suppress Boxers in various outlying regions, in the course of which unfortunate outrages were charged to the account of German and French troops. Von Waldersee ordered an eighty days joint campaign to the interior with the probable purpose of pressing the court to hasten negotiations. The American commander refused to cooperate, as did also the Russian. The British was non-committal. The expedition was postponed. A separate German sortie, from which the French had withdrawn at the last minute, was criticised as uncalled for. The British press declared Waldersee's policy more likely to prevent than to hasten the restoration of order.

Although formal evacuation did not take place till the negotiations were completed, a beginning was made as early as January, 1901, in restoring Chinese authority in Peking. Judicial and police matters were gradually replaced in Chinese hands. Most of the troops left in May and June. On September 17, in keeping with the terms of the protocol signed a week earlier, occurred the formal evacuation by the remainder, except the legation guards provided by the instrument.

PEACE.

Preparations for negotiations had been begun before the foreign entrance into Peking. On August 11, 1900, Minister Wu in Washington, handed to the State Department an Imperial edict issued three days earlier, declaring

¹⁰ A portion of the joint note signed by the diplomatic representatives of the powers, Dec. 22, 1900, to open peace negotiations, after a translation from the French by Rockhill, *Treaties, etc.*, 63. Note printed in full in *SUPPLEMENT*, p. 300.

We hereby appoint Li-Hung-Chang as our envoy plenipotentiary with instructions to propose at once, by telegraph, to the Governments of the several powers concerned for the immediate cessation of hostile demonstrations pending negotiations.¹¹

Earl Li acted immediately. August 19 and 21 the State Department received cablegrams from him. The latter read,

The Boxer rebels in Peking having been dispersed, there will be positively no more fighting. Further military operations on the part of the powers are greatly to be deplored. Etc.¹²

On August 12 and 22 the State Department expressed its willingness and readiness to treat, but showed reluctance until convinced of the plenipotentiary powers of Li. On September 7 and 9 the latter communicated Imperial edicts of August 27 and 30 conferring such powers on himself and Prince Ching, a prince of the royal family who had remained near Peking.¹³

On September 8 Prince Ching cabled to Minister Wu:

Foreign troops having entered Peking, and their Majesties the Empress-Dowager and the Emperor having gone westward on a tour (*sic*), I have received an Imperial edict appointing me envoy plenipotentiary with full discretionary powers, in conjunction with the Grand Secretary, Li-Hung-Chang, to negotiate peace.¹⁴

Similar communications passed to and from other powers, and others between the various powers. This storm of edicts and dispatches continued for more than four months before anything definite was accomplished.¹⁵ On December 22 the representatives of the eleven powers¹⁶ signed a joint note and presented it two days later to the Chinese plenipotentiaries giving the unimpassioned recital of the events of the preceding summer quoted above. It contained also a list of twelve demands as indispensable prelimi-

¹¹ Rockhill, Report on affairs in China, 14.

¹² *Id.* 16.

¹³ *Id.* 21.

¹⁴ *Id.* 22.

¹⁵ See *Id. passim* to page 57 for the American correspondence during these four months.

¹⁶ Germany, Austria-Hungary, Belgium, Spain, United States, France, Great Britain, Italy, Japan, Netherlands, Russia.

naries.¹⁷ On January 16, 1901,¹⁸ the reply was presented, after the demands had been transmitted to the Emperor. The laconic Imperial edict issued December 27, 1900, was as follows:

We have taken cognizance of the whole telegram of Yi-K'uang and Li-Hung-Chang. It is proper that we accept in their entirety the twelve articles which they have transmitted to us.¹⁹

The first joint session of the foreign envoys with the Chinese Commissioners took place February 5, 1901.

Before advancing further with the negotiations it is proper to notice the policy and influence of the United States. On July 3, 1900, while the siege of the legations was on, Secretary Hay addressed a circular note to all the powers concerned declaring the purpose of his government with reference to rescuing the legations, protection of life, property, and interests of Americans and the suppression of the existing anarchy, and concluding with the significant statement:

But the policy of the Government of the United States is to seek a solution which may bring about permanent safety and peace to China, preserve Chinese territorial and administrative entity, protect all rights guaranteed to friendly powers by treaty and international law, and safeguard for the world the principle of equal and impartial trade with all parts of the Chinese Empire.²⁰

Favorable responses were received from all governments concerned.

The gratitude of China for this firm stand is expressed in a dispatch from the Emperor to the President of the United States dated July 19 declaring, among other things,

We have just received a telegraphic memorial from our envoy, Wu Tingfang, and it is highly gratifying to us to learn that the United States Government, having in view the friendly relations between the two countries, has taken a deep interest in the present situation. Now China, driven by the irresistible course of events, has unfortunately incurred well-nigh universal indignation. For settling the present difficulty, China places special reliance in the United States.²¹

¹⁷ Rockhill, *Treaties, etc.*, 64; text in SUPPLEMENT, p. 300.

¹⁸ Rockhill, p. 66; text in SUPPLEMENT, p. 303.

¹⁹ Rockhill, *Treaties, etc.*, 66 and 74; Hertslet, *China Treaties*, I:132, in French.

²⁰ Rockhill, *Report*, 12; text in SUPPLEMENT, 1:386.

²¹ Rockhill, *Report*, 13.

While the importance and influence of American diplomacy has been exaggerated, it remains true that many of the policies adopted and adhered to by the powers were "made in America." These were nearly all in the way of compromises and greater leniency. America opposed from the first all thought of partition or abandonment of the open door. The policy of exacting long-time leases and the establishment of spheres of influence by other powers, the free discussions in their parliaments and the noisy clamorings of the press indicated that they probably would not have insisted so very strenuously on the maintenance of the territorial integrity of China. It would have been easy and natural, in the absence of any firm stand to the contrary, to have agreed upon a plan of division or at least of enlargement of their spheres. There is, however, no certainty that they would have done so. The fact remains, however, that America did first take a firm stand, that she did consistently maintain it throughout, and that the integrity of China and the open door were preserved.

England, had, theoretically at least, for many years upheld the principle championed now by America; Russia continued the role of the friend of China which she had played since the Japanese war, but at the same time she was pressing for special privileges in Manchuria. On October 16 England and Germany agreed

1. It is a matter of joint and permanent international interest that the ports on the rivers and littoral of China should remain free and open to trade and to every other legitimate form of economic activity for the nationals of all countries without distinction; and the two governments agree on their part to uphold the same for all Chinese territory as far as they can exercise influence.

2. Her Britannic Majesty's Government and the Imperial German Government will not, on their part, make use of the present complication to obtain for themselves any territorial advantages in Chinese dominions, and will direct their policy towards maintaining undiminished the territorial condition of the Chinese Empire.²²

The two powers agreed to invite the six other chief nations to accept the principles recorded in the agreement. All did so before the end of the month. In the answer of the United States, John

²² Hertslet, *China Treaties*, I:591; SUPPLEMENT, I:387.

Hay called attention to the fact that both of these principles were laid down in his circular note to the powers of July 3 preceding.²³

Although the joint sessions of the entire peace commission began early in February, the final protocol restoring peace and order between China and the powers was not signed until September 7. It contains twelve articles, of which the following is a brief summary:

1. (a) An expiatory mission under Prince Chun, brother of the Emperor (Regent and real sovereign of China since the Dowager-Empress's death), was sent to Berlin to apologize for the assassination of Baron von Ketteler, the German Ambassador; (b) an expiatory commemorative monument was to be erected in Peking on the site of his assassination.

2. (a) Punishments were inflicted on the Boxer leaders as demanded by the powers; two princes were sentenced to death with the privilege of commutation, if the Emperor wished, to exile and life imprisonment in Turkestan; three princes were ordered to commit suicide; three high officials were ordered to be executed; posthumous degradation was inflicted on three officials who had already died; five officials who had been executed for opposing the government's anti-foreign policies were posthumously restored to their rank and honor; one governor was deprived of office pending determination of his punishment; various punishments had been inflicted on provincial officials convicted of responsibility for crimes of the preceding summer; (b) official examinations were suspended for five years in all cities where foreigners had suffered.

3. An expiatory mission was sent to Japan to make reparation for the assassination of Sugiyama, Chancellor of the Japanese Legation.

4. Expiatory monuments were to be erected in each of the foreign cemeteries that had been desecrated.

5. Importation of arms and ammunition and material for their manufacture was prohibited for two years, which term was to be extended for two years longer if the powers should think fit.

6. Indemnity of 450,000,000 taels, about \$340,000,000, was to be

²³ Hertslet, *China Treaties*, I:592-596, gives these replies.

paid by China in thirty-nine annual installments with interest at four per cent. (which, added to the principal, would be more than double the amount). Certain customs and revenues were to be pledged for payment.

7. Fortification and garrisoning of the legations in Peking were provided for.

8. The Taku forts and all others which might impede communications between Peking and the sea were to be razed.

9. Certain points between Peking and the sea were to be occupied and garrisoned by the powers.

10. China agreed to post and publish for two years throughout the Empire the following edicts:

(a) Prohibiting membership in all anti-foreign societies; (b) publicly announcing the punishment inflicted on Boxer leaders; (c) suspending official examinations in cities where foreigners had suffered; (d) placing responsibility for disturbances on provincial governors and local officials in case of new anti-foreign troubles.

11. Commercial treaties were to be revised and amended; China was to assist in improving and maintaining the navigation of the Peiho and Whangpoo rivers.

12. The old cumbersome office of foreign affairs, the Tsungli-Yamen, was to be transformed into a new Ministry of Foreign Affairs, the Wai-wu Pu.²⁴

As negotiations proceeded, the powers insisted not only on promises, but that steps should be taken to carry out every agreement. This was accordingly done and edicts were published from time to time putting into effect the agreements successively reached. These decrees were attached to the final protocol, thus becoming virtually a part of it, in the form of nineteen annexes. They record in an interesting form the steps in the progress of the negotiations.²⁵

This insistence that a treaty be executed before it is signed or

²⁴ Rockhill, *Treaties, etc.*, 66-74; Hertslet, *China Treaties*, I:123-131, in French, which was made the official draft in case of dispute; text in SUPPLEMENT, I:388.

²⁵ Rockhill, *Treaties, etc.*, 74-96; Hertslet, *China Treaties*, I:132-147, in French.

ratified is a most unusual proceeding in diplomacy and is an eloquent testimony to the worthlessness of Chinese promises and the international contempt into which the events of the preceding year had brought her.

Each agreement necessitated a long series of communications between the representatives of the various powers, between each representative and his home government, between the united foreign representatives and the Chinese plenipotentiaries, and between the last named and their Imperial Court, which continued its extended "westward tour" throughout the whole period of negotiation and beyond.

The aims and interests of the various foreign powers were far from identical and the Chinese Government took advantage of every disagreement and thus secured many compromises. The first matter disposed of was that of punishments. Russia constantly opposed the efforts of the other powers to make these as severe as they deserved to be. A series of four edicts of February 13 and 21 carried out the agreements on this score.

The matter of indemnities occupied more attention than any other. The amount, the manner of payment, the best way for China to raise revenue for its payment and many subsidiary questions required separate treatment. The United States urged that the total indemnity be not more than two hundred million dollars. The American contention was supported by England and Japan with only slightly higher estimates. These three wished to avoid crippling China so much as to necessitate further international interference. But Russia, Germany, and France held out for much greater sums. The estimates as originally made would have required between four and five hundred million dollars. Finally it was compromised at a little less than three hundred and forty million dollars, or 450,000,000 taels. The Chinese authorities were amazed and urged reduction, but finally accepted it unconditionally. It had taken nearly five months to reach the settlement. Regarding the manner of raising the revenue, the British suggestion was followed; that is, China pledged the total maritime customs augmented by an increase of five per cent. in the tariff on all imports, including

articles hitherto on the free list, except food cereals and gold and silver bullion and coin; the native customs collected in the treaty ports; and the revenues of the salt tax, exclusive of the portion previously set aside for other foreign debts.

In the concluding paragraph the powers declare:

The Chinese Government having thus complied to the satisfaction of the powers with the conditions laid down in the above mentioned note of December 22, 1900, the powers have agreed to accede to the wish of China to terminate the situation created by the disorders of the summer of 1900. In consequence thereof the Foreign Plenipotentiaries are authorized to declare in the names of their governments that, with the exception of the legation guards mentioned in Article VII, the international troops will completely evacuate the City of Peking on the 17th day of September, 1901.

The evacuation of Peking was carried out but that of Tientsin, which should have taken place five days later, did not occur until nearly a year afterward. The foreign legations had been unable to induce the commanding officers of the foreign troops at the latter city, who were responsible for the safety of foreigners in North China, to live up to the agreement. Normal intercourse was resumed between China and the other powers as rapidly as the transition could be effected, in face of all the difficulties unavoidable under the circumstances.

RETURN OF THE COURT

Early in October, 1901, about a month after the final protocol had been signed, the court left its retreat at Singan, the capital of Shensi, and began a leisurely return from its "westward tour," living at the expense of the towns *en route*. Two months later it was leaving Kai-fong, the capital of Honan. After another month the entire court entrusted themselves to the care of the Belgian railway at Cheng Ting and, with a stop of four days at Pao Ting, continued their journey by train to Peking. Alighting outside the walls they entered the city by chair.

Escorted by nobles and cavalry they passed through lines of kneeling troops until they reached the Chien Men. The railway stations outside the gate had been masked by screens of matting, and the ruined towers on the wall had been flimsily restored to conceal the injuries inflicted by

the Allied forces. But groups of foreigners were on the wall, and, to the surprise of all, after the Emperor and Empress-Dowager had burnt incense in the temples at the gate, the latter, before re-entering her chair, made a deep bow to the foreign onlookers, which was repeated when they acknowledged her salute. Her attitude and expression seemed to appeal for forgiveness of the past and to show an intention of ushering in an entirely new phase in the relations of foreigners with the court.²⁶

This promise was to be fulfilled. Not only is this the beginning of a new phase in the relations between foreign powers and China, but, as much as any one event can mark a great transition in history, this resumption of authority marks the beginning of a new era for China in both foreign and domestic affairs. She had been rescued from her fiery trials of the two preceding years not by her own power, nor because of her own merits, but by the magnanimous forbearance and peaceable agreement of the allied powers in whose hands she lay helpless. It is true that China had suffered severely at the hands of the powers. They had exacted harsh terms, driven a hard bargain — too hard, doubtless. But she fared far better than she would have fared if twentieth century diplomacy were governed by the cynical spirit of the Napoleonic era, or of the age of Choiseul and Pitt and Maria Theresa and Catharine II, and Frederick the Great. Whether the credit be due to John Hay or merely to the spirit of the times which he so happily voiced, coming as this settlement did on the very threshold of the new century it augured well for the future. With only a few, and not very conspicuous, exceptions, the spirit here shown has prevailed throughout the first decade of the century and appears stronger to-day than ever.

As if out of gratitude for her deliverance, China abandoned her old anti-foreign exclusiveness and opened wide her arms to receive both the ideas and the representatives of western civilization. With a few unfortunate though inconspicuous exceptions, her official actions since have voiced the Macedonian Call "come over and help us."

On January 22, 1902, about a fortnight after returning to his palace, the Emperor tendered a formal reception to the foreign rep-

²⁶ Annual Register, 1902, 381.

representatives at which a new ceremonial previously arranged by protocol was conscientiously carried out. His few cautious remarks were confined to expressing his satisfaction that Germany was again represented at his court and his faith in the good intentions of the powers. Six days later, at a reception to the entire diplomatic body, the Dowager-Empress, who had not appeared on the 22d, sat on the throne, while the Emperor occupied a low dais in front of her. Their relative positions were expressive of their respective power. After a formal address to the Emperor on behalf of the Ministers, and his brief reply, the regent made some indistinct remarks which were interpreted as expressing her sorrow for the troubles that had occurred. Four days later, at a reception by the Emperor and Dowager-Empress to the ladies alone of the foreign legations, the aged ruler bewailed with sobs and tears the attack on the foreign legations, and presented the United States Minister's wife with bracelets and rings from her own person and, after a banquet, gave presents of jewelry to all of the ladies. Other greetings and receptions, contrary to custom, followed.

Private audiences were accorded to Sir Robert Hart who had for forty years resided at Peking, most of the time in an official capacity, without enjoying the honor; to two Roman Catholic bishops; to the manager of the Russo-Chinese Bank; and an especially distinguished reception to the Grand Duke Cyril of Russia.

The delay in the evacuation of Tientsin, alluded to above, roused some suspicion of the good faith of the allies. China sent repeated appeals against this violation of her treaty rights. The commanders of the allied troops tried to impose a new set of twenty-four conditions before evacuation. The Ministers of the powers approved. At China's request, Secretary Hay intervened and secured important modifications in July, and the evacuation was effected August 15, 1902. During the two years of foreign occupation, in spite of many difficulties, the international commission in control had made great improvements in such matters as roads, bridges, river facilities, etc.

It was four months later before Shanghai was evacuated. This delay was occasioned by a contest between Germany and England

concerning special privileges which the latter had formerly enjoyed in the Yangtse basin. Finally it was arranged that the Chinese Government would not part with any sovereign rights, or grant any preferential right in this region which was opposed to the principle of the open door, with the understanding that this would not apply to rights already conceded.

The revision of commercial treaties and the arrangement of a new schedule of tariffs on imports as provided in articles six and eleven of the final protocol of September 7, 1901, constituted the most important matters for discussion between the powers and the restored Chinese Government during the first two years after the restoration. To rearrange the tariffs, an international commission met at Shanghai shortly after the restoration of peace and continued their discussions and negotiations for nearly a year, reaching an agreement August 29, 1902, to go into effect two months later and take the place of the temporary schedule that had been in effect during the preceding year to meet the requirement of Article VI of the protocol that it should "be put in force two months after the signing." The purpose was to enable China to raise revenue to meet the annual installments of indemnity by providing, "that the existing tariff on goods imported into China should be increased to an effective five per cent." and "that all duties levied on imports *ad valorem* should be converted, as far as feasible and with the least possible delay, into specific duties." The list agreed upon of dutiable goods and the rates occupy twenty closely printed octavo pages. Furthermore it was provided in Rule I appended for the application of the tariff that "Imports unenumerated in this tariff will pay duty at the rate of five per cent *ad valorem*." Rule II provides as exceptions that the following shall be duty-free: "Foreign rice, cereals, and flour; gold and silver, both bullion and coin; printed books, charts, maps, periodicals and newspapers." The agreement was signed originally by eight powers and subsequently by four others.²⁷

²⁷ Hertalet, China Treaties, I:148-170. The original signatory powers were Austria-Hungary, Belgium, Germany, Great Britain, Japan, Netherlands, Spain, and China; the United States signed eight days later, and France, Sweden, and Norway nineteen months later.

One week after the signature of the international tariff agreement, a separate Anglo-Chinese commercial treaty (the Mackay Treaty) was signed, but not ratified till eleven months later. It revised and amended all agreements respecting commerce, navigation and kindred subjects between the two. It consists of sixteen articles, each regulating some important matter, and covers fourteen octavo pages. Among them worthy of special mention are:

Article II, in which "China agrees to take the necessary steps to provide for a uniform national coinage," a matter still unsettled but being prepared for; Articles V and X, regulating and improving internal navigation; section 12 of the eighth article opening five new treaty ports; section 4 of same continuing existing duty on foreign opium; Article XI, prohibiting importation of morphine except for medical purposes; Article XII, providing that England would surrender her extraterritorial rights as soon as the Chinese judicial system should be sufficiently reformed to warrant so doing; and Article XIII, providing in case other treaty powers should do the same, an international commission to investigate the missionary question in order to avoid, if possible, troubles such as had occurred in the past and secure permanent peace between converts and non-converts.

But the matter of greatest importance, not only for the two contracting powers but for all others interested in Chinese trade and industries, is contained in Article VIII, abolishing *li-kin*, or transit dues, and all "other dues on goods at the place of production, in transit, and at destination," which impede the free circulation of commodities and injure the interests of trade. In compensation (besides admitting exceptions in case of opium and salt and concessions regarding native custom houses and a few other matters), England consents to the addition of 2 1/2 per cent on all imports over and above the effective five per cent provided in the international tariff agreement signed a week earlier; and also allows an export tariff not to exceed five per cent and a consumption tax on Chinese products not intended for export; and provides an excise tax on native machine-made products of foreign type, the amount of which was to be equal to twice the import duty on similar foreign-made articles.

Sections 13 and 14 agree that on January 1, 1904, all *li-kin* barriers having been in the meantime removed, the agreements contained in this article are to come into force, provided that all powers entitled to most-favored-nation treatment entered into the same engagements, without having exacted any political or exclusive commercial concession in return therefor.²⁸

A little more than a year later, on October 8, 1903, the United States and Japan on the same day signed commercial conventions with China, similar in most respects, to this Anglo-Chinese treaty. Both specifically provide the agreements regarding the abolition of *li-kin*.²⁹

Among the many matters of minor importance occurring in the relations between China and the powers during the first two years of the "restoration" now being considered, a few may be mentioned. Questions arising in connection with the indemnity and its payment occasioned many difficulties. It was found that the total claims of the powers exceeded the total amount of the indemnity by about two per cent. In June, 1902, a proportionate reduction was agreed to in all of the claims. A fall in the value of silver in China virtually increased the amount of the indemnity by 100,000,000 taels over the original 450,000,000 in order to make it worth 67,500,000 pounds sterling. On China's resisting payment of the increase, the United States proposed that the question whether the payment should be in gold or silver be referred to the Hague Tribunal. Germany was willing. At the close of 1903 the question had not been decided. The United States alone accepted payment in silver; Great Britain agreed to accept payments in silver on account; Japan demanded gold. A later rise in the value of silver increased the sterling value of the income from the customs by some 3,000,000 pounds sterling and at the same time decreased the burden of the indemnity. There had also been a considerable increase in the customs revenue in 1902 in spite of the fact that the Newchwang duties were retained by the Russo-Chinese bank there.

²⁸ Hertslet, *China Treaties*, I:171-184.

²⁹ Hertslet, *China Treaties*, I:566 and 383; Rockhill, *Treaties, etc.*, 135 and 121.

When China in 1901 had proposed to send a mission to collect contributions from Chinese subjects residing abroad to assist in paying the indemnity, the powers concerned refused the passports asked.

The fortification of the legations as provided in the final protocol was completed in 1902, as was also the monument erected in Peking by the Chinese on the site of Baron von Ketteler's assassination. In the following January it was dedicated with imposing ceremonies in the presence of the foreign Ministers by Prince Chun, the Emperor's brother, who had gone on the penitential mission to Berlin. The growing friendliness toward foreigners was shown by the employment of foreigners as advisors by many provincial governments. A Protestant chapel was erected in 1902 at the capital of Hunan from which for so many years all foreigners had been excluded. In March, 1903, a gold watch was presented by King Edward to the Chinese General Mei, in recognition of his services in protecting British missionaries in Chili in 1900. In May of 1903 a British battleship visited Hankow, the first to ascend the Yangtse so far.

A few internal events during these first two years after the restoration of friendly intercourse should be mentioned, since they are of international importance. In October of 1901, while the court was still in exile, the heir apparent, Pu Chun (who had been appointed by the Empress-Dowager in 1900 when the Emperor announced that it was impossible that he should have a son), was set aside because his father, Prince Tuan, had taken part in the anti-foreign movement and had been banished therefor. The Emperor was yet childless.

Another important event occurring before the return to Peking was the death on November 7th, two months after he had signed the protocol restoring peace between his country and the powers, of the aged statesman, Li Hung Chang. His reputation had suffered during the last few years. He had been suspected of being a tool of Russia. The agreements which he seemed ready and anxious to make would have virtually ceded Manchuria to Russia. His influence with the court was so great that this would probably have

happened had he lived longer. His death increased the prospect for preserving the integrity of China. A temple was to be erected to his memory.

Yuan Shikai succeeded to Li Hung Chang's Viceroyalty of Chili at the age of forty-three, being probably the youngest official to attain such rank. He had first come into notice as Chinese Resident in Korea while China still held the sovereignty of that unhappy state. In 1898 he was commander of the chief army corps in the metropolitan provinces. At the deposition of the Emperor, the fate of the throne lay in his hands. It was he to whom the Emperor entrusted the task of arresting the Empress-Dowager and who betrayed that trust and sided with the latter and the reactionaries. He was rewarded with the governorship of Shantung, where in the following year he opposed the will of the Empress, whom he had thus virtually put into power, repressed the Boxers, and protected the foreign missionaries in their work, of which he openly approved. Since the death of the aged Li, Yuan Shikai has been the most conspicuous leader of the progressive element.

In December, 1901, took place an imposing funeral ceremony near Peking of some seventy native converts to Christianity who had been murdered during the Boxer outbreak. The Protestant missionaries, chiefly American, had agreed not to press for punishment of the guilty, provided Chinese officials should make public atonement and impress the people with the necessity of respecting and protecting missionaries and their converts. All of the principal officials in the vicinity were present.

The year 1902 threatened a renewal of the Boxer movement in seven provinces, with its anti-foreign fanaticism and attacks on native Christians. Two missionaries were murdered in Kansu and two in Hunan. After much pressure, the local military authorities, who had refused protection to the last two, were ordered executed, and all local officials concerned were punished. In Kansu the leader of the rebellion made severe demands on the Peking Government. A similar leader in Mongolia was acting in harmony with him. In Sze-chuen several chapels were burnt, and, it was estimated, probably with exaggeration, that from three hundred to one thousand

converts were killed. In Kiang-Si a revolt, which was essentially anti-dynastic, was led by Dr. Sun, who had been educated at Harvard and London. He had formerly organized the Chinese Progressive Society to accomplish his purpose. At the end of the year there was much anxiety, but the danger was exaggerated. During the next year the movements everywhere collapsed or were suppressed by the viceroys who were not only more favorably disposed toward foreigners, but better able to cope with internal disturbances than formerly.

Drought and famine in some parts and floods and famine in others in 1901 had greatly aggravated the difficulties. Millions had died and many other millions were made homeless. Missionaries did all they could to give relief. Piracy in the neighborhood of Canton prevailed both in 1901 and 1902. Foreign pressure was brought to bear on the viceroy to suppress it. Cholera was prevalent in all parts of the Empire in the latter year. The price of grain rose to famine figures in the south.

In spite of the general suffering and in spite of the impoverishment of the Empire, lamented in Imperial decrees, there was needlessly lavish expenditure on objects of no benefit to the country. When the court visited the tombs in April of 1903, fifty trains were required for the paraphernalia; and on the return 200,000 taels were said to have been spent on decorating the train and the Peking station. The celebration of the Empress-Dowager's seventieth birthday was estimated to have cost 10,000,000 taels.

A valuable precedent in the establishment of justice in Chinese trials was furnished in 1903 by the case of a journalist of Shanghai who had made a gross attack on the dynasty. In spite of his culpability, the Municipal Council insisted on a fair trial, although the authorities would have summarily executed him, as in the case of a man who had just been flogged to death for a similar offense at Peking by order of the Empress-Dowager. Even some of the Ministers were inclined to allow the authorities to do as they pleased with the Shanghai culprit. He finally obtained a fair trial and was regularly condemned.

MANCHURIA.

The most important matters in China during the decade, considered from an international standpoint, are those growing out of the situation in Manchuria. With the Russo-Japanese war, as such, this paper has nothing to do, and with the influence of Korea in bringing about that struggle it is not concerned, since, as stated above, Korea passed from under the suzerainty of China with the signature of the Treaty of Shimonoseki. Four years later a treaty of amity and commerce between China and her former vassal state definitely established the equality of the latter with the former so far as sovereignty is concerned.³⁰ The gradual encroachments of Japan, the extinction of Korea's ephemeral independence and the final annexation to Japan which has just been accomplished,³¹ form an intensely interesting study, but they are without the scope of this paper. The part that Manchuria played, however, in bringing about the titanic struggle between Japan and Russia, and the influence, in turn, of that struggle on the situation in Manchuria are of vital concern to this study.

To understand the international complications that have arisen during the last decade regarding Manchuria, it is necessary to return again to the middle of the preceding decade. The cession of the southern point, the Liaotung peninsula, to Japan by the Treaty of Shimonoseki in 1895, and its retrocession to China before the close of the same year on the urgent advice of Russia, seconded by Germany and France, have already been studied. The reason why Russia was so anxious to prevent Japan from violating the integrity of China's continental territory was soon evident. On December 10th of the same year the charter of the Russo-Chinese Bank was granted by the Czar to the manager of the affairs of the Committee of the Siberian Railway. Among a multitude of other purposes for which the corporation was created is named the following:

the acquisition of concessions for the construction of railways within the boundaries of China and the establishment of telegraphic lines.³²

³⁰ Hertslet, *China Treaties*, I:241.

³¹ See Treaty of Annexation, SUPPLEMENT, p. 282.

³² Rockhill, *Treaties*, etc., 209.

The next step was the signature of an agreement, September 8, 1896, between the Chinese Government and the Russo-Chinese Bank for the construction and management of the Chinese Eastern Railway. Nothing is said regarding the route or length of the line, except

For the purpose of surveying the course of the railway, the Chinese director will depute an officer to act in conjunction with the company's engineer and the local officials along the route, who will arrange matters satisfactorily.

Among the numerous provisions, apparently for the mutual benefit of the company, of China, and of Russia, one provides that, "The Chinese Government will take measures for the protection of the line and of the men employed thereon." Another provides that eighty years from the opening of the completed railway, "the line and all its property are to revert to the Chinese Government without payment." After thirty-six years China was to have the privilege of purchasing it.³³ The statutes of the railway, confirmed by the Ruling Senate at St. Petersburg, December 4 of the same year, define the route as,

within the confines of China from one of the points on the western borders of the Province of Hai-Lun-Tsian (Hilung-Chiang), to one of the points on the eastern borders of the Province of Ghirin (Kirin).³⁴

There is no authority in the above agreement for the introduction of Russian soldiers and guards. The statutes mention "Police agents appointed by the company" to preserve law and order on the lands assigned to the railway. It is strongly suspected that a secret treaty signed in April, 1896, gave Russia authority to introduce soldiers and establish other regulations for the railway.³⁵

In the treaty of March 27, 1898, leasing to Russia Port Arthur and Talienwan, the Chinese Government agreed that the Manchurian Railway Company (which name seems to have displaced that of Chinese Eastern) should have the privilege of constructing

³³ *Id.* 212.

³⁴ *Id.* 215.

³⁵ Hershey, *International Law and Diplomacy of Russo-Japanese War*, p. 13.

a branch line from a certain station on the aforesaid main line to Talienwan. * * * The provision of the agreement of the 8th of September, 1896, between the Chinese Government and the Russo-Chinese Bank, shall be strictly observed with regard to the branch line above mentioned. The direction of the line and the places it is to pass shall be arranged by Hsu Ta-jen and the Manchurian Company. But this railway concession is never to be used as a pretext for encroachment on Chinese territory, nor to be allowed to interfere with Chinese authority or interests.³⁶

In the additional agreement of May 7th following,

It is further agreed in common that railway privileges in districts traversed by this branch line shall not be given to the subjects of other Powers. As regards the railway which China shall (may) herself build hereafter from Shan-hai-kuan in extension to a point as near as (lit. nearest to) possible to this branch line, Russia agrees that she has nothing to do with it.³⁷

An Anglo-Russian agreement of April 28, 1899, concluded a long-discussed arrangement regarding the respective railway interests of these powers in China. It provided that Great Britain would not seek railway concessions north of the Great Wall nor obstruct Russian applications for such in that region. Russia would not seek such nor obstruct English applications in the valley of the Yangtse. The two contracting powers declare they have "nowise in view to infringe in any way the sovereign rights of China or existing treaties." Both agree that the Shan-hai-kuan to Newchwang railway must remain a strictly Chinese line.³⁸

After Russia had leased Port Arthur and obtained the Manchurian railway concessions of 1896 and 1898, Russian colonists began to pour into northern China. Large numbers of troops were collected at Port Arthur — far more than its use merely as a naval base warranted. During the Boxer outbreak, Russia took advantage of the general absorption and the suspension of Chinese authority to rush troops into Manchuria and seize the most important

³⁶ Hertslet, *China Treaties*, I:508; Rockhill, *Treaties*, etc., 52.

³⁷ Hertslet, *China Treaties*, I:509; Rockhill, *Treaties*, etc., 54; text in SUPPLEMENT, p. 291.

³⁸ Hertslet, *China Treaties*, I:509; Rockhill, *Treaties*, etc., 52; text in SUPPLEMENT, p. 298.

places. Frightful atrocities are charged to the Russians in some of these attacks. By the time order was restored, the greater part of Manchuria was occupied by Russian troops. A circular note issued by Russia August 28, 1900, declared the occupation temporary and promised that as soon as pacification should be attained and necessary measures should be taken for preservation of the railway, Russia would withdraw her troops from Chinese soil. Repeated assurances were given that Russia had no desire to seize Chinese territory.³⁹

The Anglo-German Agreement of October 16, 1900, discussed above, declared for the maintenance of the territorial integrity of China and the "open door" for trade. This was opposed to Russia's suspected recent efforts with regard to Manchuria, though in perfect accord with her public utterances. Some question arose later as to its interpretation, Germany holding that it did not include Manchuria, but England insisting that it did include every part of the Chinese Empire, which seems to be the plain reading of the agreement.⁴⁰

Through 1901, while the negotiations were in progress for the general treaty of peace, Russia was separately treating for privileges in Manchuria, which Li Hung Chang seemed anxious to grant and which would have left to China only nominal control. At the instance of other powers, China refused to sign the Russian conditions. Japan was greatly wrought up. Russia replied to Japanese representations that it was an affair between Russia and China only, but that the terms would not be found to be injurious to Japan. Early in 1902 Great Britain, Japan, and the United States renewed their protest against continuing the Russian military occupation for three years, as China seemed about to concede. Russia renewed to the United States the assurance that the commercial rights of all nations would be respected within the Russian zone of influence.

An unexpected arrangement entered at this juncture to affect

³⁹ Hershey, *International Law and Diplomacy of the Russo-Japanese War*, 18. This work in the following pages discusses many suspected but unauthenticated official statements and supposed projects of conventions regarding Russia's position in Manchuria. It also gives an interesting and concise discussion of all the negotiations preceding the war.

⁴⁰ Hertslet, *China Treaties*, I:591.

Russia's policy. A treaty of alliance signed January 30, 1902, declared:

The Governments of Great Britain and Japan, actuated solely by a desire to maintain the *status quo* and general peace in the extreme East, being moreover specially interested in maintaining the independence and territorial integrity of the Empire of China and the Empire of Corea, and in securing equal opportunities in these countries for the commerce and industry of all nations, hereby agree as follows:

In case either power in defense of these interests should be involved in war the other would first use its efforts to prevent more than one nation from attacking its ally; in case that could not be done, it would come to its ally's assistance and conduct the war in common.⁴¹ This was of course directed first against Russia, and then against France in case that power should come to Russia's assistance, as was possible in view of the close alliance that had existed between them for about a decade to protect their European interests. This agreement having been communicated to those powers, they came to an understanding about a month later and made it public, declaring themselves satisfied with the declaration of the principles of England and Japan which had constituted and should remain the base of their own policy. An additional article definitely extended their alliance to the Far East,⁴² to the great detriment, it is considered by some, of French prestige.⁴³

On April 8, 1902, the long negotiations between Russia and China came to a conclusion by Russia's abandoning her extreme contentions and accepting the counter-proposals of Prince Ching. The first article declares, in part, that Russia

overlooking the fact that attacks were first made from frontier posts in Manchuria on peaceable Russian settlements, agrees to the re-establishment of the authority of the Chinese Government in that region which remains an integral part of the Chinese Empire and restores to the Chinese Government the right to exercise therein governmental and administrative authority, as it existed previous to the occupation by Russian troops of that region.

⁴¹ *Id.* 597; Rockhill, *Treaties, etc.*, 97; text in SUPPLEMENT, 1:14.

⁴² Hertslet, *China Treaties*, I:598.

⁴³ Tardieu, *France and the Alliances*, 18 *et seq.*

In article two the Chinese Government

takes upon itself the obligation to use all means to protect the railway and the persons in its employ, and binds itself also to secure within the boundaries of Manchuria the safety of all Russian subjects in general and the undertakings established by them.

Russia in turn agrees

provided that no disturbances arise and that the action of other powers should not prevent it, to withdraw gradually all its forces from within the limits of Manchuria in the following manner:—

(a) Within six months from the signature of the agreement to clear the southwestern portion of the Province of Mukden up to the River Liao-che of Russian troops, and to hand the railways over to China.

(b) Within further six months to clear the remainder of the Province of Mukden and the Province of Kirin of Imperial troops.

(c) Within the six months following to remove the remaining Imperial Russian troops from the Province of Hai-lung-chang.

The third article provides for the number of Chinese forces needed to police the country, and the fourth provides for the return to China of the Chinese railway in southwestern Manchuria, connecting Peking with the Russian Harbin-to-Dalny line.⁴⁴

At the end of the first six months the troops were withdrawn as agreed. But there were evidences that Russia was strengthening her hold on the remainder. At the expiration of the second six months only an exceedingly small beginning of evacuation was made. But in a few days new troops arrived. New conditions were demanded as the price of carrying out the second part of the evacuation, provisions which, if agreed to, would have closed Manchuria to all foreigners but Russians, and would have provided for the non-alienation of Manchurian territory to any power other than Russia. On discovery of this attempt there was great irritation, especially in the United States and Japan. These two and England protested to Russia, which power denied that such attempt had been made though the fact to the contrary was clear. The United States and Japan pressed for the conclusion of their commercial treaties, both of which required the opening of the Manchurian ports. China insisted that she could not open them since she did not possess them. The agree-

⁴⁴ Hertslet, *China Treaties*, I:509; text in SUPPLEMENT, p. 304.

ments were, however, both signed, October 8, 1903, as discussed above, though not ratified until the January following.

The date of the signature of these treaties was that on which the third evacuation was to have been completed and Manchuria entirely freed from Russian troops. No movement had been made to carry out even the second. The final evacuation date passed without any movement. Next day the Russian garrison at Newchwang paraded the streets; and two days later foreigners were invited to witness a display of Russian military and naval strength at Port Arthur. The fortifications there and at Dalny were being strengthened and the inner harbor was being deepened. Already eight ironclads and a fleet of torpedo boats could be anchored where before only small native boats could venture. In Mongolia, Russia was said to be pursuing the same course as in Manchuria. Railways were being projected, commercial resources were being explored, and Russian traders were displacing Chinese. Russia's intention had been foreshadowed by an edict of three months earlier erecting the new Russian Viceroyalty of the East under Admiral Alexieff.

Great resentment was displayed abroad, especially in Japan. China, indignant, talked of war for a few days then turned its attention to the elaborate celebration of the Empress-Dowager's seventieth birthday. Yuan Shikai, the progressive Viceroy of Chili, and recently appointed Commander-in-Chief of the Chinese army, urged the necessity of fighting Russia, and, in case Japan should declare war, of supporting her.

Japan's fruitless attempt to induce Russia to respect the territorial integrity of China and fulfill the agreement to evacuate Manchuria; Russia's delays and evasions and finally virtual refusal; the revelation of Russia's intention not to stop with Manchuria but to encroach on Korea; Japan's demands that Russia reconsider and reply more favorably; Russia's long delay; and, finally, the severance of diplomatic relations by Japan, February 5, 1904, followed by the immediate mobilization of her forces and the commencement of hostilities without a formal declaration of war, are matters too familiar to need more than this brief allusion. The military details have no place in this paper, although Manchuria was the theater of action

and the Chinese of Manchuria suffered extensive losses from, and were compelled to serve, both hostile armies in turn. They were helpless to join either as combatants.

China early announced her complete neutrality, but reserved the liberty to act in case either combatant should desecrate the Imperial tombs in Manchuria. The United States led the foreign powers in calling upon both Russia and Japan to respect the neutrality and territorial integrity of China, both during and after the war. China's pitiable helplessness made it impossible for her to enforce respect for her neutrality in the cases where the exigencies of war made it practically impossible for the belligerent powers to avoid violating it. Russian vessels of war interned in Chinese ports gave considerable anxiety, especially the difficulty she had in enforcing the disarmament of them. The transport ships seeking refuge in Chinese ports after the battle of the Sea of Japan gave trouble, as did Japan's seizure of a Russian refugee ship in a Chinese port, and the maintenance of a Russian wireless telegraph station on Chinese soil.

When the war was brought to an end by the belligerents' acceptance of the friendly intervention of President Roosevelt, Port Arthur and Dalny were in Japanese hands and also southern Manchuria to a point a little beyond Mukden. The destruction of the whole of Russia's available navy made Japan's position at Port Arthur unassailable.

The Treaty of Portsmouth, signed September 5, 1905, provided, regarding Manchuria, that the evacuation of the armies should commence simultaneously and immediately after the treaty of peace should come into operation, and be completed within eighteen months, excepting the territory affected by the lease of the Liaotung peninsula and with the reservation that the two powers should have the right to maintain guards to protect their respective railway lines in Manchuria; all portions of Manchuria occupied by the armies of either power should be restored to the exclusive administration of China, except the leased portion; Russia declared she did not have in Manchuria any territorial advantages or preferential or exclusive concessions impairing Chinese sovereignty or inconsistent with the principles of equal opportunity; the two powers engaged reciprocally

not to put any obstacle in the way of general measures applying equally to all nations which China might take for the development of commerce and industry in Manchuria; Russia transferred to Japan, with the consent of China, the lease of Port Arthur with all territory, rights, privileges, and property thereto belonging, without, however, impairing the property rights of Russian subjects; Russia also transferred to Japan, with China's consent, without compensation, the Manchurian railway from Dairen (Dalny, Talienwan) northward to Kwang-ching-tsu (437 miles) with its branches, and all rights, privileges, and properties; neither power was to use its respective railway for strategic purposes, save that portion within the leased territory around Port Arthur; a separate convention between the two powers to be concluded as soon as possible would regulate their connecting railway service in Manchuria.⁴⁵ These provisions established a Japanese sphere in the south and a Russian in the north, which was the much larger portion.

A new and much stronger Anglo-Japanese alliance replacing that of three years earlier had been signed August 12, preceding the conclusion of the Treaty of Portsmouth. It declared for its object:

(a) The consolidation and maintenance of the general peace in the regions of eastern Asia and India; (b) the preservation of the common interests of all powers in China by insuring the independence and integrity of the Chinese Empire and the principle of equal opportunities for the commerce and industry of all nations in China; (c) the maintenance of the territorial rights of the high contracting Parties in the regions of Eastern Asia and of India, and the defense of their special interests in the said regions.

Each power bound itself to come immediately to the assistance of the other in case the other should be attacked in defense of the rights or interests mentioned.⁴⁶ This greatly strengthened the hands of Japan in the negotiations with Russia, and made impossible any violation of the principles of territorial integrity of China and equal opportunity in Manchuria.

China and Japan signed a separate treaty on December 22 of the

⁴⁵ Hertslet, 608, in French; Hershey, 341, gives a translation; English text in SUPPLEMENT, 1:17.

⁴⁶ Hertslet, China Treaties, I:606; SUPPLEMENT, 1:15.

same year, which confirmed all the transfers and assignments made by Russia to Japan in the Portsmouth treaty with reference to railways and leased territory. An additional agreement opened sixteen additional places in Manchuria to international trade; provided that if, and as soon as, Russia would do the same, Japan would withdraw her railway guards from Manchuria when China should be capable of affording full protection to the lives and property of foreigners; gave Japan the right to maintain and work the railway between Antung and Mukden for fifteen years, after which it should be sold to China; and established several minor rules and regulations.⁴⁷

As the Japanese troops evacuated Manchuria, steady streams of Japanese immigrants flowed in and colonies suddenly sprang up eager for trade and investment. The Japanese succeeded where Russians had failed. This movement has continued ever since. Development was so rapid that labor was scarce in spite of constant immigration from China to supplement the Japanese. Railway traffic was heavy. China showed reluctance to agree to anything that might imply permanence of Japanese tenure. Japan was piqued at Chinese suspicion and ingratitude. Discord grew up on many matters. On April 15, 1907, they signed an agreement providing for the sale by Japan to China of the railway constructed by the former from Mukden to Sin-min-tun; and for special favors to the Japanese South Manchurian Railway Company to the exclusion of all other capital except Chinese in a loan for the construction of a branch to Kirin.⁴⁸ On numerous minor matters discord continued between China and Japan, especially with reference to telegraphs, mails, and the importation of morphine. The Japanese evacuation of Manchuria was not yet complete at the end of 1907 as it should have been before the middle of the year.

Complaint grew serious that Japanese policy was not consistent with preservation of equal opportunity. The United States objected to Japan's exclusion of foreign capital from railway building. Japan admitted that she had followed Russia's policy, and by preferential

⁴⁷ Hertslet, *China Treaties*, 391; SUPPLEMENT, p. 307.

⁴⁸ Hertslet, *China Treaties*, 397; text in SUPPLEMENT, 1:15.

rates diverted to Dairen some trade that would have gone to Newchwang. These were later equalized.

One of the most serious recent misunderstandings between China and Japan in Manchuria was regarding the line which China proposed to construct from Sin-min-tun to Fakumen, and for which she had borrowed English capital. Japan objected that this would compete with her South Manchurian line, especially if it should be continued further north. To offset this, China was objecting to Japan's reconstructing the narrow gauge line from Mukden to Antung as a standard gauge. Japan was anxious to do this since at the latter place the line would become continuous with her line through Korea, thus giving direct railway communication with Europe. China proposed reference of the dispute to the Hague Tribunal, but Japan refused on the ground that diplomatic means had not been exhausted. Finally, China yielded both railway disputes to Japan. In August, 1909, she withdrew her objection to Japan's reconstruction of the Antung to Mukden line; and in September agreed not to build a railway near or parallel to Japan's South Manchuria line, and specifically not to build the Sin-min-tun to Fakumen line, without consulting Japan. China thus virtually withdrew from Manchuria so far as railways are concerned and left the field to Japan. All that China got in exchange for this was a decision in her favor in a boundary dispute on the Korean-Manchurian border and jurisdiction over Koreans who had entered certain Chinese territory and over whom Japan claimed extraterritorial control.⁴⁹

Mining interests were also regulated by the September agreement. There was great apprehension in the United States that a monopoly had been created in favor of China and Japan. An investigation and diplomatic inquiries satisfied the State Department that no such monopoly was involved, and in November the United States Government accepted the settlement.

Japan's aggressive policies in Manchuria are very severely criticised. The Japanese press is urging that suzerainty over Manchuria be asserted. The Japanese in the province are domineering and

⁴⁹ Agreements printed in SUPPLEMENT for April, 1910, p. 130.

treat it as a conquered country. The Japanese guards of the railway are found at great distances from it interfering in matters not of their concern. Chinese officials are obliged to wink at violations of law by Japanese.

Since the Treaty of Portsmouth, Russia in her sphere of northern Manchuria has been doing, or attempting to do, about what Japan has in southern. China has plucked up courage to offer some resistance and with some apparent success. She objected to Russians continuing to work a timber concession at Kirin after its expiration. She sent a considerable detachment of her new foreign drilled army to prevent encroachments on the Mongolian frontier. In 1908 a dispute arose over Russia's assertion of exclusive jurisdiction over both Chinese and foreigners at Harbin and elsewhere within the railway zone. China refused to recognize the regulation, protested to Russia, and was supported by the United States consul. In May, 1909, a convention between the two settled the dispute by recognizing Chinese sovereignty and dividing the jurisdiction.⁵⁰ Protests from the United States and Austria-Hungary and consequent international disagreements delayed ratification.

In July of the present year Russia and Japan concluded a new treaty to govern their relations in Manchuria.⁵¹ The first article provides that they will lend friendly cooperation in developing their respective railway lines in Manchuria. The second provides for the maintenance of the *status quo* resulting from the treaties, conventions, and other arrangements already made between the two and between either and China. The third article agrees that in case there should arise any menace to the *status quo* Russia and Japan will consult each other as to the proper action.

Secretary Knox last year, seeing that Russia and Japan were using, or were suspected of using, their railway rights in Manchuria to gain special privileges there which were hardly consistent with the Treaty of Portsmouth, and wishing to remove, if possible, this danger to the "open door" policy, proposed a novel scheme. He suggested that

⁵⁰ Text in SUPPLEMENT, 3:289.

⁵¹ SUPPLEMENT, p. 279.

capital should be secured in the six great nations — Japan, Russia, Great Britain, France, Germany, and the United States — and loaned to China to enable her to anticipate 1938 and purchase the Manchurian railways now. The capitalists were willing; the European powers were willing; but Russia and Japan were not. As the purchase could be made only with their consent, their unwillingness ended that phase of the negotiations.

The editor of the London *Spectator* says that no other answers could have been expected, that the construction of Russian and Japanese railways in Manchuria does not violate the Treaty of Portsmouth; and that neutralization would mean a large international financial enterprise, and probably — what would be most undesirable — a partial occupation of Manchuria by the powers.⁵²

In a later number, the same periodical condemns Mr. Knox's so-called interference as unreasonable, unjustifiable, and impracticable, since, it says, America has not the strength to back up her policies by force. It is implied that the State Department has belittled itself to serve the interests of American capital abroad. The fact seems to have been overlooked, or ignored, that Secretary Knox is asking for American capital nothing but what would be enjoyed in common with the other great countries. If he were, he would not be doing more than European foreign offices have long been doing.⁵³

The plan for the purchase by China of the railways in Manchuria being thus defeated, Secretary Knox proposed that capital from the same international sources be loaned to China for the construction of the proposed new railway from the neighborhood of Peking almost directly northward through Mongolia tapping the Trans-Siberian at Tsitsihar in north Manchuria and passing on to the Amur at Aigun. There is a hope, but still no certainty, that the nations concerned may consent. The fact that it would compete to a certain extent with the present Manchurian lines will cause Russia and Japan to be slow in agreeing to it.⁵⁴

⁵² See *Spectator*, Jan. 29, 1910.

⁵³ A good statement of the advantages that would have come from this is to be found in the editorial pages of this JOURNAL for July of the present year, page 688.

⁵⁴ An interesting case of the admission of American capital to a share in

THIBET.

Of the Chinese vassal states, the most important remaining is Thibet. During the last decade it seemed that this dependency was about to go the way that Korea has been going since the middle of the preceding decade and the way Cochin-China and Burmah went during the preceding century, and most of Central Asia at earlier times. A brief recital of these events is proper here. The fact that its ruler is also religious head of the Buddhist faith makes Thibetan affairs of interest to all powers, native and foreign, who have interests or possessions in southern Asia.

Considerable uneasiness was occasioned in China by a Thibetan mission to Russia in 1901. Its object seems to have been to obtain religious concessions for Buddhist subjects of the Czar. The same year considerable Buddhist enthusiasm was roused by the visit of the Chief Lama of Peking to Tokio to express gratitude for protection of the Lama Temple in Peking afforded by Japanese troops during the foreign military occupation. The Japanese nationalist party took advantage of it to urge the benefits of an alliance between Japan, China, and Korea, the principal Buddhist countries.

But the interest in Thibet centers about the Younghusband Expedition of 1903 and 1904. There had been projects for extending British trade from India to Thibet since the time of Warren Hastings in the eighteenth century. In 1884 an expedition of investigation was arranged, but when China protested vigorously it was abandoned in exchange for the relinquishment of Chinese sovereignty in Burmah. Soon after this the Thibetans occupied and fortified Sikkim, a British vassal state in India on the Thibetan frontier. Diplomacy failing to dislodge them, the British threat was carried out in 1889 and they were driven out by force.⁵⁵ The Indian Government considered the annexation of the Chumbi Valley in Thibet near by, but this was given up out of deference to China. In 1890 a treaty between India and China provided for the settlement of these fron-

Chinese railway building enterprises that had been previously settled in favor of British, French and German capital is also discussed in the July number of this JOURNAL, page 687.

⁵⁵ Douglas, *Europe and the Far East*, 243, 253.

tier disputes and for regulating trade relations, and another in 1893 confirmed and completed its arrangements.⁵⁰ The subsequent efforts to put these into effect revealed the fact that neither China nor Thibet had any intention of carrying them out. They followed Dickens's "Spaulow and Jorkins" plan, each expressing willingness but pleading inability because of the opposition of the other. These futile negotiations dragged for ten years.

The Chinese restored government suggested in 1902 that a British-Chinese-Thibetan Commission should proceed to the frontier and discuss on the spot the questions at issue. In May of 1903 China was informed that the Viceroy of India was about to send such commissioners to meet the others at the nearest inhabited place on the Thibetan side of the frontier.

In July Colonel Younghusband with an escort of 200 men, keeping 300 in reserve at Sikhim, arrived; but neither Chinese nor Thibetan commissioners had appeared by the end of the year. It becoming clear that the Thibetans were preparing to resist by force, the British reserve was increased to 3,000 though the mission remained ostensibly peaceable. The Indian Government proposed to send the expedition on to Lhasa and establish a British Resident there, since it suspected that Russia had designs on Thibet. If so, now was the chance to foil them while that power was involved in the struggle with Japan in Manchuria. But the superior authorities at London vetoed the proposal and directed that the mission should not use force and should withdraw as soon as negotiations should be concluded. The Russian Ambassador had declared that his government had no designs on Thibet and remarked that Russia would view with apprehension any attempt to disturb the *status quo* in that country.

The expedition approached Gyangtse in the neighborhood of which it was met by the expected opposition and in several encounters during March, April, and May of 1904, broke the resistance. The peaceable pretense was abandoned and the expedition advanced on Lhasa, reaching the forbidden city in August. The Dalai Lama

⁵⁰ Hertslet, *China Treaties*, I:92 and 96.

fled, leaving a regent to effect a settlement. Negotiations required about a month.

On September 7 the treaty was signed with impressive formalities.⁵⁷ The treaties of 1890 and 1893 were confirmed and amended and their execution provided for. Trade marts were to be opened at Gyangtse and Gartok in addition to that at Yatung provided for in the preceding conventions. A British agent was to reside at each place. Thibet was to keep open and in repair the roads to the open places. Thibet agreed (a) not to cede, sell, lease, mortgage or otherwise yield to any foreign power without British consent any portion of Thibetan territory; (b) not to allow any such power to intervene in Thibetan affairs; (c) not to admit any representatives or agents of such to Thibet; (d) not to grant to such or its subjects any concession for railways, roads, telegraphs, mining or other rights; and (e) not to pledge or assign to such any Thibetan revenues, whether in kind or cash. An indemnity of about 500,000 pounds sterling was to be paid in seventy-five annual installments, beginning with January 1, 1906, to cover the expenses of the expedition to Lhasa. The Chumbi Valley should be occupied by England as security until all was paid. As this would practically amount to annexation, which would be inconsistent with promises made to the Russian and Chinese Governments, the indemnity was reduced by the home government to one-third the amount and a promise made that the Chumbi Valley occupation should cease after the payment of the third installment, provided the trade marts should have been effectively opened for three years and the terms of the convention complied with in all other respects.⁵⁸ Colonel Younghusband was censured by the home government for exceeding his authority.

It was not until eighteen months afterward that China agreed to the terms of the Thibetan Convention. On April 27, 1906, an Anglo-Chinese treaty confirmed the Thibetan. It further agreed that England would not annex Thibetan territory or interfere with the administration of Thibet; and China would not permit any other foreign state to do either. The concessions which were forbidden

⁵⁷ Text in SUPPLEMENT, I:80.

⁵⁸ Hertslet, *China Treaties*, I:204.

without British consent were to be permitted to China but denied to all others.⁵⁹

The Anglo-Russian Convention of August 31, 1907, creating the *entente cordiale* now existing between those powers and settling all Central Asiatic questions, included, besides the Persian arrangement and the Afghanistan convention, also an arrangement concerning Thibet. In it both contracting powers recognize Chinese suzerainty in Thibet and the special interest of England due to her geographical position in maintaining the existing regime, internal and external; they agree to respect the territorial integrity of Thibet and abstain from interference in the internal administration; neither will treat with Thibet except through the Chinese Government; this, however, is not to prevent the relations between British commercial agents and Thibetan authorities provided for in the convention of September 7, 1904, nor hinder British and Russian Buddhists from entering into strictly religious relations with the Dalai Lama; neither will send any representatives to Lhasa, nor seek any railway or other concession, nor acquire any Thibetan territory.⁶⁰ Attached notes agree not to prevent the entrance of any scientific mission providing the consent of China be secured. A new Anglo-Chinese convention regulating Thibetan trade for ten years was signed in April, 1908. Trade was growing steadily and rapidly. The Dalai Lama who had fled on the approach of the Younghusband Expedition in 1904, did not return to his capital until January of the present year, 1910. In the meantime he had travelled from place to place. His most important visit was that to Peking in 1908 where he remained four months, in a vain attempt, it is thought, to induce China to recognize the independence and sovereignty of Thibet. But China was unwilling to part with even her shadowy sovereignty. There had apparently been much discontent at Lhasa with the extended absence of their sovereign.

In March of the present year, only two months after his return, he again took flight, this time to India. The occasion was the arrival of more than a thousand Chinese troops. He probably feared

⁵⁹ *Id.* 202; text in SUPPLEMENT, 1:78.

⁶⁰ Hertslet, *China Treaties*, 620; SUPPLEMENT, 1:398.

deposition or a worse fate. His reign has been unusually long. China apparently prefers to have a child wear the crown as it is easier to retain control. Freed from the danger of encroachments on her integrity by the chain of agreements studied above, it is thought that China is determined to make good her control of Thibet.

On the part of some British alarmists in India and at home it is regarded as a menace to India for China to take effectual control of Thibet; but the saner minds see no danger, and believe that the best guarantee for peace in the East is for China to be strong enough to protect herself. The withdrawal of British troops from the Chumbi Valley, which has been effected, is criticised by militant spirits as a mistake. But simple good faith in the observance of the treaty demanded it.

MINOR FOREIGN MATTERS SINCE 1904

The difficulties arising in connection with the payment of the indemnity in the first two years after the return of the court have been noted. The customs, the chief source of revenue for its payment, continued to increase through 1904, 1905, and 1906. The value of silver continued to appreciate during the same years so the burden of payment in gold was lightened. In 1904 China consented that payments should be in gold, and the following year agreed to pay 1,200,000 pounds sterling in satisfaction of arrears due to previous payments in silver. In 1906 China took steps to take over the management of her maritime customs which had for so many years been in British hands. England protested that it was in violation of agreements to the effect that no change would be made so long as British trade exceeded that of other powers. Young Chinese were being trained for and introduced into the subordinate positions in the customs service. During 1907 and 1908 there was a decrease in the customs owing to the general money stringency of the first of the two years. It was accompanied by a new depreciation in silver.

The announcement of the United States in 1908 that she would forego the payment of 2,500,000 pounds sterling of the indemnity

was welcome news to China. A special ambassador was sent to the President with a letter of thanks, and arrangements were made to spend most of the money thus saved by sending young Chinamen to be educated in American schools.

This did much to remove the unfriendly feeling toward the United States which had prevailed for several years owing to the galling restrictions imposed on Chinese who visited or attempted to visit the United States. The boycott of American goods, started in 1905, had resulted from this. It spread rapidly to all open ports, then to Hong-Kong, Singapore, and Bangkok. Upon the United States Government's making representations to China, Wu Ting Fang was sent as special commissioner to negotiate a new immigration treaty. When Mr. Taft visited Chinese ports in 1907, he found that the anti-American feeling of two years earlier had almost disappeared. His speeches made a favorable impression and hastened the returning friendliness. When the American fleet on its world tour touched at Amoy in 1908, it was accorded a notably enthusiastic reception and honored by special commissioners.

There has been a growing sentiment in China that the time has come for her to rid herself of the humiliating inconvenience occasioned by the rights of extraterritoriality which she has granted to all western powers. In the English commercial treaty of 1902 and those with the United States and Japan in the following year definite agreements are included to surrender these rights as soon as Chinese law and court procedure is sufficiently reformed. Such will doubtless come but is a good while in the future.

As China recovered her strength, she abandoned her spirit of subservience to foreign powers, and its place was taken by one of sullen reserve. The language of the press was unfriendly to foreigners. Suspicion of England was engendered by electioneering allusions in England to the so-called Chinese slavery in South Africa. Especially was the feeling of coldness and suspicion directed toward Japan because of the conflict of interests in Manchuria studied above, and the imperious manner of Japan there. This feeling was intensified in 1907 by Japan's reviving an ordinance of eight years earlier forbidding Chinese to work in agriculture, fishing, mining, manufac-

turing, and other industries without special permission from the local authorities. Any who violated this were liable to expulsion. It practically excluded Chinese labor except in cases where Japanese was insufficient to meet the demands. China retaliated by weeding Japanese officers out of the Chinese army, many of whom had in 1905, fresh from their experience in the war against Russia, found employment there.

The Tatsu-Maru incident occurring in 1908 increased still further the irritation toward Japan. The Japanese vessel of this name was seized by the Chinese near Macao on a charge of landing arms for Chinese revolutionists. Japan demanded an apology and indemnity and threatened forcible action. The Portuguese Minister supported the Japanese contention that the ship had been seized in Portuguese waters. China finally apologized, and promised to punish the responsible officials, release the vessel, pay an indemnity and purchase the arms; but Japan in turn promised to enforce new regulations against the shipment of arms to Macao. The release of the vessel provoked an indignation meeting in Canton. A boycott of Japanese goods was threatened.

Cases in which attacks on foreigners in China made necessary the conclusion of special agreements for indemnity and punishment have been much less frequent in recent years than formerly. One such occurred in 1908 on the frontier between Yunnan and Tonking. During a revolt in the former, Chinese bands crossed the frontier and a French officer and six soldiers were killed in French territory. France demanded severe punishment of the offenders and an additional railway concession. The latter was not granted but the punishment was inflicted.

An agreement between Japan and France signed June 10, 1907, recognized the integrity of China; accepted the principle of equality of treatment in that country; and pledged mutual support in maintaining the territorial *status quo* in the Far East.⁶¹ China resented as derogatory to her sovereignty a clause in the treaty which mentioned regions "adjacent to the territories" where France and Japan

⁶¹ Hertslet, *China Treaties*, 618; Supplement to Rockhill, *Treaties, etc.*, p. 30; text in SUPPLEMENT, p. 313.

had "rights of sovereignty, protection and occupation;" but the matter was explained away. A similar treaty with a like purpose in view was signed between Russia and Japan July 30, following.⁶² These two agreements virtually brought England's Oriental ally into the Western triangular entente, just then being completed, of England, France, and Russia.

Notes exchanged between the United States and Japan on November 30, 1908⁶³ (a notable and not universally approved departure in American diplomacy), provided for the maintenance of equal opportunity for the commerce and industry of all nations in China and agreed to support the independence and integrity of China by all peaceable means. The understanding was welcomed in both countries and approved by China, to which power the text of the notes had been previously submitted.

Several miscellaneous agreements between China and other powers and between other powers relating to China not previously mentioned have been concluded during the decade, some of which are worthy of mention. In September, 1905, China and all of the powers that had signed the final protocol of September, 1901, concluded the so-called Whangpoo Conservancy Agreement providing for the improvement and maintenance of the navigation of that river. During the decade Great Britain entered into a series of agreements with almost all powers for the protection of trade marts in China.⁶⁴ In 1904 England and China concluded a convention respecting the employment of Chinese labor in British colonies and protectorates; and in 1905 another respecting the junction of Chinese and Burmese telegraph lines.⁶⁵

The only other matter of large interest in the foreign relations of China is the granting of concessions to foreigners for the construction of railways, working of mines, etc. During the decade and in a few preceding years great numbers were granted, partly because of

⁶² Hertslet, *China Treaties*, 619; Rockhill, *Treaties, etc.*, 161; SUPPLEMENT, 1:396.

⁶³ Text in this JOURNAL, 3:168.

⁶⁴ Hertslet, *China Treaties*, I, *passim*.

⁶⁵ *Id.* 189, 195.

their value to China but more frequently because they were demanded and China was unable to resist. To merely enumerate these would be of little interest or value, and to write at sufficient length to make it interesting and valuable would require too much space for this paper. Suffice it to say that each year of the last decade has seen many new railways completed and many more projected. Progress has been steady. Capital has been drawn from nearly every western country, and much Chinese capital is being invested. About the middle of the decade opposition began to grow to the further granting of concessions to foreigners; and local obstruction of progress on lines thus conceded has been common. Each year since, the development and rapid growth of a spirit of patriotism and national pride which followed Japan's defeat of Russia greatly strengthened their feeling of hostility toward the development, not to say exploitation, of China by foreigners. Careless wording of the concessions and sometimes conflicting grants caused difficulties, delay, and discontent. The government determined not to grant any more concessions to foreigners and to regain control of those previously given whenever possible.

The concession for a line from Canton to Hankow held by an American company was repurchased in 1905. Unfortunately it has progressed very slowly since passing wholly to native hands. Other redemptions have followed. The government has upheld concessions granted, in case the owner did not willingly sell, but in several cases the companies tiring of attempting to work in the face of local opposition have given up and sold voluntarily. Foreign capital continues in demand even where the management is Chinese whether private or governmental.

At the close of the preceding decade there were hardly more than a hundred miles of railway in all China. Now about five thousand miles are completed and in full operation. Some two thousand more are under construction and many more lines are being projected. In the northeastern part construction has, naturally, been less rapid. The Russian and Japanese lines in Manchuria have already been discussed. They together constitute about one-third of the total mileage in operation. The next most extensive is the Peking to

Hankow line connecting the capital with the middle Yangtse basin. The projected line from Canton to Hankow, when completed, will continue this to the great southern metropolis. These together will constitute the great artery of the Chinese railway system almost 1400 miles in length. A line from Tientsin through the coast provinces to Nanking on the lower Yangtse is being constructed, which will doubtless later be continued around the coast to Canton. A line is projected and partly constructed from Canton westward to Yunnan almost to the Burmah border. Numerous short lines, some in operation, others under construction, center about the great cities of Canton, Shanghai, Hankow, Peking, and others. But all this is scarcely a beginning. There remain still vast areas to be opened up. Many whole provinces are yet untouched. And the great dependencies, Thibet, Mongolia, and Turkestan are hardly thought of as railway fields.

Telegraph lines have far outgrown the railways and are more widely diffused. There are more than twenty-five thousand miles under operation. Next to railways, the most attractive investments for foreign capital, hitherto, are in the mines which are exceedingly rich, varied and widely diffused. Many mining concessions have been granted to foreigners and are being worked. But here, too, the field is only touched. The development of mines must await the construction of railways.

Manufacturing, too, is an industry in which much foreign capital is finding investment and many foreign experts and corporations, employment. The cheapness of Chinese labor, compared with that of western countries, makes profits for capital large. Fifteen men in the iron works at Hankow are said to receive a wage equal to one man in Pittsburg, and the efficiency of a Chinese workman is about ninety per cent of that of an American. The recent decline in the value of Chinese silver has greatly cheapened the cost of Hankow pig iron in competition with western. Wages continue to be paid in silver and at the same rate as formerly, so the cost of iron reckoned in taels is the same as it was; but a gold coin of a western country will purchase twice as many taels' worth of Chinese iron as formerly. It is being shipped in large quantities to the Pacific coast of America.

The United States Steel Corporation is seriously considering erecting mills in China. The problem of the competition of Chinese labor with that of the western world is becoming a serious one and cannot be dealt with by immigration laws alone as formerly. What is true of iron will be true of other products when China is fully opened up.

INTERNAL AFFAIRS; REFORMS; CONSTITUTION

Internal matters of foreign concern have been reviewed above to the end of 1903. Riots and kindred internal disturbances have since become less frequent. In the south a rebellion broke out anew in 1904. Several towns fell into the hands of the leaders. Troops sent against them joined them and a viceroy went in person to suppress them. In Honan, Chili, and Shantung recrudescences of the Boxer movement were repressed. Failure of crops in 1906 brought famine in some parts. Local authorities furnished some relief though the central government did nothing. Missionaries distributed aid coming from foreign subscriptions. Liberal donations from America and the prominent part that President Roosevelt took helped to allay the anti-American feeling expressed in the boycott of the previous year. Of some 10,000,000 sufferers, about one-fifth died. The return of spring in 1907 ended the famine, except in Kiangsu where floods renewed famine conditions. In that year and the following, sedition and rebellion were renewed but did not become serious. The summer of 1909 brought floods again in some parts and drought in others causing famine conditions to return. Early in the present year occurred serious riots at Changsha in Hunan which has been for a quarter of a century or more the headquarters of the most rabid opposition to foreigners. Foreign property was attacked, six missions and many foreign-owned buildings and consulates being destroyed. No life was lost. The causes were the high cost of living, lack of employment, race antipathy, and the traditional anti-foreign sentiment of the locality.

The relations between missionaries and the people, official and unofficial, have been steadily becoming more cordial. There have been attacks on missionaries, and murders of missionaries since 1904, but

such have been much less frequent than before, and have been promptly punished. In 1907 all officials were called upon to acquaint themselves with provisions in various treaties affecting Christianity, and to secure the better protection of Christians, both foreign and native, in their respective districts. Missionaries are being consulted by local officials everywhere and are occupying important places as physicians and teachers and official advisers.

The almost simultaneous deaths of the old Empress-Dowager and the young but feeble Emperor, whom she had for the preceding ten years kept in leading strings, occurred in November, 1908. The latter's death had been long expected; but the Empress-Dowager's seventy-fourth birthday had been celebrated less than a fortnight before and there seemed to be no apprehensions of her early death. The new Emperor selected was, according to recent custom, an infant, son of Prince Chun, who has been prominent in the affairs of government since 1900. It was he who went on the penitential mission to Berlin to atone for the assassination of the German ambassador. He has been a conspicuous actor in bringing about the reforms of recent years. He was made regent for his son and has since been the real ruler of China, though he himself is a young man, — less than thirty years old. He is a younger brother of the preceding Emperor. The dynastic change had little influence on the policies of the government. All that had been done was endorsed and the advance has been continued along all lines at about the same rapid rate.

The questions of reform in China and the adoption of occidental civilization had been agitating the country during the last decade of the nineteenth century. The Emperor's conversion and his attempt to force reform too rapidly was what led to the *coup d'état* of 1898. During the year of exile while foreign troops occupied the capital many Imperial edicts gave prospects of reform. They dealt chiefly with changes in the educational system, abolition of useless offices and the selection of competent officials, and the reorganization and instruction of the army. The movements along these lines have continued.

Yuan Shikai, who succeeded Li Hung Chang in the Viceroyalty

of Chili, engaged Japanese officers to drill his provincial troops and urged the central government to accept an offer made by Japan to lend a Japanese general to reorganize the entire military system. To meet the expenses of this military rehabilitation as well as the cost of administrative reforms, Sir Robert Hart advised increasing the land tax, and steps were taken to do so. The progress in improvement of the foreign drilled Chili troops excited the admiration of foreign military *attachés*. Viceroys in other places began to follow the example. In 1905 a decree from the throne called on nobles to give their sons a military education. This has gone far to raise the calling, previously despised, in public estimation. The military spirit has grown rapidly.

The year 1906 was most remarkable for changes in all directions. Reforms actually begun were far more radical than those only advised in 1898 and for which the advisors lost their heads. The adoption of foreign models in the army and administration, as well as in education, industry, economics, and political life, was begun in earnest. Centralization of power over the provincial armies was begun and has advanced so that China's army is becoming national. A little more than a year ago the Emperor assumed supreme command of the army and navy, which are organized after the German model, and are being trained by Japanese officers. Military schools have been established in various provinces, and each year a number of men are sent to Japan for military instruction. Should occasion offer, the Chinese army will surprise the world after a little more training as much as did the Japanese in 1904. There are now in the army between five and six hundred thousand men of whom some 160,000 are already trained. Plans are on foot to increase this efficient number rapidly so that by 1913 there will be 400,000 and by 1920, 1,185,000. It is reported that the Chinese Government has made a proposition to Lord Kitchener to take charge of her army and complete its reorganization and training.

Administrative reforms have gone hand in hand with military. In 1904 several useless posts were abolished for sake of economy. Next year the Viceroy at Tientsin advocated the payment of good salaries to officials, abolition of Manchu privileges, promotion of

education, assistance to the poor, conscription for the army in case it should be needed, and many other progressive schemes which the movements of the following years have carried out. Young men have been promoted to the highest offices. In 1906 many more useless offices were abolished, and the conduct of official business was simplified by a reorganization of the cumbrous old government boards. In 1907 many changes were made weakening the Hulanese, or reactionary, element and strengthening the Cantonese, or progressive. Yuan Shikai was promoted from the Viceroyalty at Tientsin to the central administration at Peking, where his influence was soon felt still more. Many special Manchu privileges were abolished to appease the growing dissatisfaction toward Manchu rule. Their pensions were replaced by grants of land. Restrictions on trading, intermarriage, and other things that kept them distinct from the Chinese, were removed.

A threatened reaction manifested itself about the middle of 1907 when the influence of the progressive element seemed about to be undermined by corruption. But they regained ascendancy before the end of the year. Many reforms were not satisfactory. They went too far and too fast for some and not far enough or fast enough for others. At the very end of the year 1908 came the startling announcement that the progressive Yuan Shikai had been dismissed, his suffering from rheumatism being given as the cause. But it was thought that was not serious enough to constitute sufficient reason. A new reaction was apprehended. But a progressive successor has continued his policies.

The new spirit has grown too strong to be repressed. A new patriotism stimulated by Japanese example and accomplishments pervades all classes. Students returning brought back philosophical political treatises which were translated and widely circulated. The theories of Rousseau are being discussed freely by the public press.

Progress and changes in education began early in the decade, in fact, important steps had been taken before the Boxer troubles. In 1902 came edicts encouraging western sciences; and colleges had been opened in eleven provinces. The returning national pride in 1903 expressed itself by excluding for a time all European and American

instructors from the University of Peking; but the restriction was removed after a few years. By 1905 students returning from Europe and America found their foreign studies a key, no longer a bar, to advancement. In this year a decree swept away the old system of education based entirely on the classics and added the western learning. The traditional system of public examination in the classics as a condition of obtaining employment in the state was swept away everywhere, as it had been in a few places by the final protocol of 1901. Numerous schools and colleges not only for men, but for women also, including normal and technical schools, were established. No complaint is made of lack of funds for the purpose. At Canton, the old examination hall was removed to make place for a college consisting of three blocks of buildings. Temples are being converted into schools.

For fear the passion for western learning and its official adoption might lower the Chinese classics in common estimation, a decree of 1907 elevated Confucius to a higher rank in Chinese worship than he had hitherto occupied, and another decree a week later declared that Chinese studies should be considered superior to western learning.

Among the phenomenal reform decrees of 1906 was one abolishing the use of opium gradually, to be complete within ten years. Regulations to effect this were published in November. Both cultivation and smoking were to cease, a little at a time, within that period, under penalty of banishment. In the meantime smokers were to be registered; shops were to be gradually closed; official returns of sales were to be made; medicines to cure the habit were to be distributed; all officials, except those in the palace or of great age, were called upon to abandon the habit. Arrangements were to be made with foreign governments for the restriction and gradual abolition of its import, for its higher taxation and for the enforcement of the new regulations in the foreign settlements. These regulations are moderate compared with others issued at various times during the last century. The temper of the people has changed; and enforcement is comparatively easy, so the regulations are being reasonably enforced and bid fair to accomplish their purpose in the time al-

lotted. Even foreign governments, especially the British Government of India, are lending their hearty cooperation. In some places, of course, enforcement is not so easy as in others. An international conference for the study and investigation of opium, its effects, and its abolition, sat at Shanghai in 1909. Its findings are assisting the effort to suppress the evil.⁶⁶

But the most revolutionary of all the reforms China has undertaken is the adoption of constitutional government and the creation of a parliament. Following Japan's example of about a quarter of a century earlier, an Imperial Commission was sent in 1905 to study the governments of foreign countries. In July of the following year the commission returned and a committee of high dignitaries was appointed to consider its report.

An Imperial edict declared that the backward condition of China was due to a lack of confidence between the throne, the ministers, and the masses. Foreign powers, it continued, became wealthy and powerful by granting constitutions to the masses and allowing all to participate in the government. A new commission was appointed in 1907 to make a special study of the systems of Great Britain, Germany and Japan, which were to be the chief models. Later decrees explained that the people must be taught patriotism and loyalty, and be given experience in local government before a share in the national could be given. The experiment made at Tientsin of allowing a town council to assist the regular city government was ordered to be imitated in the provincial capitals and gradually throughout the Empire.

It was declared that the formation of a regular national parliament was not then practicable. As a preliminary step, preparations were made to establish an Imperial assembly. It is for the present a consultative body, merely, with no real power except such as its individual members can exert. It is composed of the representatives of the different boards in Peking and nominees of the governors and viceroys of the provinces. In their individual capacity they have great influence. Many wished a speedy consummation of the plan

⁶⁶ See article by Dr. Hamilton Wright in volume 3 of this JOURNAL and accompanying documents in the SUPPLEMENT.

for a parliament. The first commission sent abroad advised, on its return, fixing the time at five years for the complete adoption of a constitutional system. Finally in 1908, on August 27, the constitution was definitely promised to be completed within nine years, or by 1917, at which time the lower, or representative, body should be convoked.

Numerous voluntary political associations quickly sprung up whose purpose is to aid in the task of educating the masses for their political duties. Such are the *Association for Preparing Constitutional Citizenship*, *Association for the Study of the Constitution*, and others. The Imperial edicts had exhorted all the people to unite in the effort to prepare for the new regime.

By the autumn of 1909 the Provincial assemblies created in pursuance of the constitutional decrees of the previous year were chosen. The electorate was narrow. The qualifications were either experience in public office, high educational attainment, or the possession of 5,000 taels worth of property. The councils are for the present consultative only. Their purpose is to discover and voice public opinion as to the needs of the people. The first meetings were in October. The subjects open for their discussion were limited. Procedure was on western models. Reporters had their places. Debates were recorded. Members received payment and traveling expenses.

Thus the promised constitution bids fair to be completed and in operation by the promised year 1917. Much pressure has been brought to bear during the last summer to shorten the period of preparation and even to convoke the popular branch of parliament immediately. But so far it has been successfully resisted. China will probably do better to bide her time, wait patiently the seven years longer, and be the better prepared to enjoy the privileges and responsibilities of a constitutional regime.

This is, in the barest outline only, the story of the wonderful progress of the last few years. It is briefly summed up in the following words closing a lecture delivered last autumn by Harlan P. Beach:

Those who, like myself, can compare the China of twenty-five years ago with the China of this year of grace can scarcely believe our senses.

Steam navigation extending to shallow streams; railways, telegraph lines, and telephones even in the Imperial capital; silk filatures and miniature South Bethlehems belching out occidental pillars of smoke; groaning presses pouring forth books by the million and periodicals without number; waterworks and sanitation for many great cities; a modern army and a navy of occidental type; old examination halls, where within five years as many as 25,000 students have competed for degrees in a single center, demolished to make room for colleges of the modern sort; hundreds of thousands of boys and girls, many in natty uniform, attending the lower schools, from the kindergarten up; opium dens under the ban and footbinding about to leave the home; thousands of students back from Japan and the Occident to leaven the new nation; the tortures of the old law court disappearing while new codes are evolving; great numbers gathering in orderly lecture halls night by night to hear politics, history, education, and reform discussed; (and) a constitutional government promised for a near date.⁶⁷

WILLIAM R. MANNING.

⁶⁷ Blakeslee, *China and the Far East*; Clark University Lectures, 275. This collection of twenty-two lectures presents in a very interesting form much useful information about the recent history and present conditions and problems of the Far East.

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EDITORIAL COMMENT

THE NORTH ATLANTIC COAST FISHERIES¹

The Tribunal of the Permanent Court of Arbitration at The Hague handed down its award on September 7th in this long-standing and vexatious dispute between Great Britain and the United States and both countries are to be congratulated that the controversy and principles involved in it have been decided after a prolonged and careful examination for the purpose of determining the rights and duties of each litigant. But the great importance of the arbitration can hardly be said to lie in the award: the example of two great and powerful nations submitting to judicial determination an acute controversy involving a question of sovereignty and its exercise is likely to influence

¹ A critical and detailed examination of the arbitration and the award will appear later in the JOURNAL.

other nations to resort to this peaceable method of settling intricate disputes dangerous to their peace, and the award is calculated to create confidence in the method. Within three weeks of the present award the United States and Venezuela submit their difference in the Orinoco Steamship Company case to arbitration at The Hague and two other arbitrations are in the course of preparation. Every war, it is said, carries with it the seeds of future wars; it may be said with greater confidence that each arbitration leads inevitably to arbitration and accustoms the world to the peaceful settlement of international disputes.

In the present instance the award determines the rights of the United States under the convention of 1818 and enables the Government to inform American fishermen of their rights and duties, thus settling old controversies and preventing new ones, and in determining the rights of Great Britain under the same convention enables the British Government to hold the colonies to the strict observance of their duties as defined by the award without the suggestion of undue Imperial interference or dictation. The award is therefore mutually beneficial to the two countries so recently contending at The Hague, even although it may not have given to either the full extent of its claims. The example to the world is greater than the benefit to either litigant and the advantage to each transcends the terms of the award.

It is not the purpose of the present comment to state the origin or nature of the controversy, with which the reader is already sufficiently familiar,² but to express in brief and summary form the questions submitted to the Tribunal and its decisions upon them as they appear in the award which is printed in full in the judicial decisions of the present number of the Journal.³

In the final position assumed in submitting the case to arbitration, the Government of Great Britain contended for the right directly or indirectly through Canada or Newfoundland, to make regulations applicable to American fishermen in treaty waters without the consent of the United States, in respect of (1) the hours, days, or seasons when fish may be taken on the treaty coasts; (2) the method, means and implements to be used in the taking of fish or in the carrying on of fishing operations on such coasts, provided such regulations were "reasonable, as being for instance, appropriate or necessary for the protec-

² See JOURNAL, 1:963.

³ Page 948.

tion and preservation of such fisheries; desirable on grounds of public order and morals; equitable and fair as between local fishermen and the inhabitants of the United States."

The United States, on the other hand, denied the right of Great Britain to make such regulations "unless their appropriateness, necessity, reasonableness, and fairness be determined by the United States and Great Britain by common accord and the United States concurs in their enforcement."

The fishing regulations were thus by the submission of both parties to be reasonable; who was to pass upon the question of reasonableness? The Tribunal has affirmed the right of Great Britain "to make regulations without the consent of the United States" but lays down that "such regulations must be made *bona fide* and must not be in violation of the said treaty;" and that "regulations which are appropriate or necessary for the preservation of such fisheries, or desirable or necessary on grounds of public order and morals without unnecessarily interfering with the fishery itself, and in both cases equitable and fair as between local and American fishermen, and not so framed as to give an advantage to the former over the latter class, are not inconsistent with the obligation to execute the treaty in good faith, and are therefore not in violation of the treaty."

So far the award is squarely in favor of Great Britain, but the award goes further and holds that, if the reasonableness of a regulation is contested, Great Britain is not to be the judge of what is or what is not reasonable. The language of the award on this *crucial* point is as follows:

By reason, however, of the form in which Question I is put, and by further reason of the admission of Great Britain by her counsel before this Tribunal that it is not now for either of the parties to the treaty to determine the reasonableness of any regulation made by Great Britain, Canada, or Newfoundland, the reasonableness of any such regulation if contested, must be decided not by either of the parties, but by an impartial authority in accordance with the principles hereinbefore laid down, and in the manner proposed in the recommendations made by the Tribunal in virtue of Article IV of the agreement.

But the present purpose is not necessarily to examine the recommendations drawn up by the Tribunal and inserted in the award; it is sufficient to state that Great Britain is no longer the judge of the reasonableness of a contested regulation and that the reasonableness or unreasonableness of future regulations is henceforth to be determined by impartial authority instead of by partial authority as in the past.

This provision of the award thus seems substantially the result for which the United States has contended.

The necessity of submission to "impartial authority" in case of a contested regulation may well result in practice in the amicable discussion by the interested parties of proposed regulations so as to prevent the delay and expense likely to result from a reference to the "impartial authority" provided for by the award.

The award on the first question is thus in substance a victory for the United States.

Question II involving the right of the United States to employ as members of the fishing crews non-inhabitants of the United States is decided in favor of the right of the United States. The reservation in the second paragraph of the award negatives any treaty rights in aliens, who derive their rights solely from their employer.

In the exercise of the fishing-rights under the convention of 1818, the United States claimed that its inhabitants were not, without its consent, to be subjected "to the requirements of entry or report at custom-houses or the payment of light or harbor dues, or to any other similar requirement or condition or exaction."

The decision of the Tribunal on this point raised by Question III is very reasonable and satisfactory to both parties. The duty to report is not unreasonable, if the report may be made conveniently either in person or by telegraph. If no reasonably convenient opportunity be provided, then the American vessel need not report.

The second and final clause of the award on this point is admirably clear and concise: "But the exercise of the fishing liberty by the inhabitants of the United States should not be subjected to the purely commercial formalities of report, entry and clearance at a custom-house, nor to light, harbor or other dues not imposed upon Newfoundland fishermen."

The United States has always admitted and stated in the presentation of its case that American fishing vessels exercising their treaty rights might properly be called upon to make known their presence and exhibit their credentials by a report at customs, but on the other hand, the United States always denied that such vessels could be subjected to the customs regulations imposed upon other vessels, or required to pay light, harbor or other dues not imposed upon local fishing vessels. The award, therefore, sustains the American contention to its fullest extent.

The convention of 1818 permitted American fishermen to enter the

bays or harbors of the non-treaty coast covered by the renunciatory clause "for the purpose of shelter and of repairing damages therein, of purchasing wood and of obtaining water, and for no other purpose whatever." The treaty specifically subjected American fishermen to such restrictions as might be necessary to prevent them from abusing the privileges thus reserved.

Great Britain contended as to this question (Question IV), that vessels seeking these non-treaty ports were to be treated as ordinary vessels, subject to local ordinances and regulations, whereas the United States maintained that the ports were to be treated as ports of refuge and that subjection of fishing vessels to the prerequisite of entering and reporting at custom-houses, or of paying light, harbor or other dues would unjustly impair and limit the privileges which the clause meant to concede. The Tribunal adopted the American contention as in accord and with the "duties of hospitality and humanity which all civilized nations impose upon themselves."

To prevent the abuse of the privileges, the Tribunal holds that if the American vessel remains in such ports for more than forty-eight hours, Great Britain may require such vessel to report either in person or by telegraph, at a customs-house or to a customs official, if reasonably convenient opportunity therefor is afforded. Question IV is thus decided in favor of the American contention.

By the convention of 1818 the United States renounced the right "to take, dry, or cure fish on, or within three marine miles of any of the coasts, bays, creeks or harbours of His Britannic Majesty's dominions in America", not included within the limits specified by the treaty. Great Britain contended that the United States renounced by this clause the right to fish within all bays and within three miles thereof, whereas the United States maintained that it renounced merely the right to fish within such bays as formed part of His Majesty's dominions, that is to say, territorial bays; that only such bays whose entrance was less than double the marine league were renounced, and that in such cases the three marine miles were to be measured from a line drawn across the bays where they were six miles or less in width. In other words, Great Britain argued that "bays" were used in both a geographical and territorial sense, thereby excluding American fishermen from all bodies of water on the non-treaty coast known as bays on the maps of the period, whereas the United States insisted that "bays" were used in the territorial sense, and therefore limited to small bays.

Question V asked "from where must be measured the 'three marine miles of any of the coasts, bays, creeks or harbors' referred to in the said Article?" The Tribunal adopted the British contention only to the extent of holding that the word "bays" must be interpreted as applying to geographical bays. "In case of bays the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the three marine miles are to be measured following the sinuosities of the coast."

A body of water, geographically called a bay, may cease to have "the configuration and characteristics of a bay" and at this point the line is to be drawn. This would leave each bay to be considered by itself, and the Tribunal recognized that the terms of its award would be too general. Therefore to avoid this difficulty it conceded in part the contention of the United States and recommended the ten-mile provision found in recent fishery treaties and drew the lines in the most important bays of the non-treaty coast in general accordance with the unratified treaty of 1888 between Great Britain and the United States, with, however, very considerable modifications in favor of the United States. Without indulging in criticism of the award, attention is called to the very able dissenting opinion of Dr. Drago.⁴

The attempt of Great Britain under Question VI to exclude American fishermen from "the bays, harbours and creeks" of the treaty coast, which would have worked irreparable injury to American fishing interests, signally failed, and the final question (Question VII) was likewise resolved in favor of the United States, for it is held that its inhabitants are entitled to have for their vessels "the commercial privileges on the treaty coasts accorded by agreement or otherwise to United States trading vessels generally," provided "the commercial privileges are not exercised concurrently" with the exercise of treaty rights.

With the exception of Question V, the award of the Tribunal was unanimous.

Both the United States and Great Britain are to be congratulated upon the award. As previously stated, the real importance lies in its international bearings; for it furnishes an example of the peaceful and harmonious settlement of international disputes which will not, it is to be hoped, be without influence upon the world at large.

⁴ Printed in this JOURNAL, p. 988.

MELVILLE WESTON FULLER

DAVID JOSIAH BREWER

*Memorial Note*¹

Thrice within a period of less than nine months, as the hand of Death reached forth, has its finger pointed to a member of the Supreme Court of the United States. On October 14, 1909, Mr. Justice Peckham died at his home in Altamont, near Albany, N. Y.; on March 28, 1910, Mr. Justice Brewer died at his home in Washington, and less than four months thereafter, amidst the festivities of our national holiday, on the Fourth of July, came the news of the sudden death of the Chief Justice at the summer home which he had made at Sorrento in his loved and native State of Maine.

Never before in the history of the court has a President been called upon to fill so many vacancies in so short a period.

All of these men were eminent jurists; all had been on the bench for many years and had gained the confidence of the country. Each had lived beyond the allotted term of three score years and ten, and, under the law, might have laid down the burden of his judicial duties; each however had continued to discharge the functions of his high office from an equally high sense of duty. Mr. Justice Peckham was nearly 71, Mr. Justice Brewer nearly 73 and the Chief Justice was over 77 years of age. Each had demonstrated after he had reached the age of elective retirement that he was still in full mental vigor and strength.

The Chief Justice and Mr. Justice Brewer both died very suddenly. Each was apparently in good health a few hours before the end, and the news of his death came as a shock, not only to the country, but to his family and to his colleagues.

For more than twenty years these two men were closely associated as members of the same court; seated next to each other for more than a third of that time, their intercourse was of the closest. They had many thoughts in common; though on occasions they differed, they were generally found aligned together when the court divided. And so it was when one went, the other quickly followed. Like Saul

¹ The JOURNAL is indebted, for this memorial note, to the courtesy of Charles Henry Butler, Esq., Reporter of the Decisions of the Supreme Court of the United States. — ED.

and Jonathan, they were pleasant in their lives and in their death they were not divided.

The lives of Chief Justice Fuller and Mr. Justice Brewer, and the numerous able and important decisions rendered by them have been elaborately reviewed in many of the journals of the day, and it is only towards their work in connection with international affairs that the few inadequate words that follow will be directed. The brief summaries which appeared in the latest editions of the *Congressional Directory*, are appended hereto for reference as to some of the conspicuous events of their lives.²

² MELVILLE WESTON FULLER, Chief Justice of the United States, was born in Augusta, Me., February 11, 1833; was graduated from Bowdoin College in 1853; studied law, attended a course of lectures at Harvard Law School, and was admitted to the bar in 1855; formed a law partnership in Augusta, Me., and was an associate editor of a Democratic paper called *The Age*; in 1856 became president of the common council, and served as city solicitor; removed to Chicago, Ill., in 1856, where he practiced law until appointed Chief Justice; in 1862 was a member of the State constitutional convention; was a member of the State legislature from 1863 to 1865; was a delegate to the Democratic national conventions of 1864, 1872, 1876, and 1880; the degree of LL. D. was conferred upon him by the Northwestern University and by Bowdoin College in 1888, by Harvard in 1890, by Yale and Dartmouth in 1901; was appointed Chief Justice April 30, 1888, confirmed July 20, 1888, and took the oath of office October 8, same year. He was chancellor of Smithsonian Institution; chairman trustees Peabody Education Fund; vice-president John F. Slater Fund; member board of trustees of Bowdoin College; one of the arbitrators to settle boundary line between Venezuela and British Guiana, Paris, 1899; member permanent court of arbitration, The Hague; member arbitral tribunal in the matter of the Muscat Dowhs, The Hague, 1905; received thanks of Congress December 20, 1889.

DAVID JOSIAH BREWER, Associate Justice of the United States Supreme Court, was born in Smyrna, Asia Minor, June 20, 1837; was the son of Rev. Josiah Brewer and Emilia A. Field, sister of David Dudley, Cyrus W., and Justice Stephen J. Field; his father was an early missionary to Turkey; was graduated from Yale College in 1856 and from the Albany Law School in 1858; established himself in his profession at Leavenworth, Kan., in 1859, where he resided until he removed to Washington to enter upon his duties; in 1861 was appointed United States commissioner; during 1863 and 1864 was judge of the probate and criminal courts of Leavenworth county; from January, 1865, to January, 1869, was judge of the first district court of Kansas; in 1869 and 1870 was county attorney of Leavenworth; in 1870 was elected a justice of the Supreme Court of his State, and re-elected in 1876 and 1882; in 1884 was appointed judge of the Circuit Court of the United States for the eighth district; was appointed to the Supreme Court, to succeed Justice Stanley Matthews, deceased, in December, 1889, and was commissioned December 18, 1889; president

Both of these eminent jurists were vice-presidents and members of the Executive Council of the American Society of International Law. Appropriate action has been taken in regard to the death of Mr. Justice Brewer,³ and will be taken in regard to that of the Chief Justice.⁴ Each had taken an active interest in its affairs, had participated in the meetings of the Society and were among its valued members. Nay more! Each in his speech and by his acts had done his valiant part in carrying forward the greatest work of modern times — that of establishing peaceful methods for the settlement of international disputes. Each had served on international tribunals, and each in both national and international courts had rendered decisions on important questions of international law — decisions which will stand as monuments to

of the Venezuelan Boundary Commission, appointed by President Cleveland; member of Arbitration Tribunal to settle boundary between British Guiana and Venezuela; orator at bicentennial, Yale University, 1901; president International Congress of Lawyers and Jurists, St. Louis, 1904; received degree of LL. D. from Iowa College, Washburn College, Yale University, State University of Wisconsin, Wesleyan University, Middletown, Conn.; University of Vermont, and Bowdoin College.

³ At the meeting of the bar and officers of the Supreme Court of the United States in memory of Mr. Justice Brewer, held on April 30, 1910, Mr. George Grafton Wilson, a member of the American Society of International Law, made the following remarks and placed upon the record the resolution therein referred to which had been adopted by the Society.

"The American Society of International Law has been in session in Washington since Thursday of this week. During this period we have missed very keenly the genial and inspiring presence of our distinguished vice-president, Justice Brewer. When it was learned that you would gather here this noon to pay tribute to his memory, the Society adjourned to join with you in that tribute. We recognize his distinguished service to a branch of law somewhat different from those branches which have already been particularly mentioned — to International Law, which has gained greatly in importance during the period which Justice Brewer has served in this great court. Since 1890 cases have become more and more frequent, involving such legal principles as those in which we are specially interested. The Society, particularly regardful of his services to international justice, adopted the following resolution:

"The American Society of International Law desires to record, with profound sense of loss, the death of Hon. David J. Brewer, since 1889 a justice of the Supreme Court of the United States, in 1896 president of the Venezuela Boundary Commission, in 1899 a member of the Venezuela Arbitration Tribunal, from its foundation a vice-president and loyal supporter of the American Society of International Law."

⁴ There has been no meeting of the Society or of the Executive Council since the death of Chief Justice Fuller.

mark the way, and as beacon lights to guide the course, of those who must decide the cases arising in the future.

It is by such decisions, elucidating the law in each particular case as it comes before an international tribunal, that gradually a great body of international law will be built up exactly in the same manner as the common law, as now applied, has been the gradual development of centuries of the best legal thought of the Anglo-Saxon race.

In his lecture on the "Value of Authority of Adjudged Cases," Mr. Justice Miller says that while the main value of such authorities may be in the character of the court deciding the cases, that value may be very much enhanced by the standing of the judge delivering the opinion. Judged from that standpoint, surely the opinions of these two eminent members of the great court whose bench they adorned for so long a period must always have a predominant value, and will be cited not only as decisions of that court but also as individual utterances of those best qualified to speak in regard to the matters involved.

It will, of course, be impossible to refer to more than a few of the many hundreds of opinions delivered by them in the course of their judicial careers.⁵ Only a few can be selected and those will be amongst their recent utterances; not because they are the most important, but because they are those with which the writer is most familiar.

Before referring to the opinions delivered in the national courts it will be proper to make a brief reference to the instances in which they participated as judges in international tribunals.

In December 1895, acting upon the Venezuelan message of President Cleveland which so startled both this country and Great Britain, the Congress passed an Act appointing a commission to investigate the boundary line between Venezuela and Great Britain. This was done in order that the United States might not demand for Venezuela any more than that country was entitled to.

The commission as organized, consisted of Mr. Justice Brewer as president, Chief Justice Alvey of the Court of Appeals of the District of Columbia, Mr. Frederic R. Coudert of New York, Mr. Daniel C. Gilman, President of Johns Hopkins University, and Mr. Andrew D. White, President of Cornell University. It entered upon the dis-

⁵ For an interesting review of some of the decisions of Mr. Justice Brewer, see the remarks of the Attorney-General presenting resolutions on his death to the Supreme Court of the United States on May 31, 1910, and which will appear in Volume 218, United States Reports.

charge of its duties, but before the investigation was completed, the British foreign office realized that the United States was in earnest in the intention, which it had expressed through President Cleveland and Secretary of State Olney, to resist all encroachments and to make a vigorous stand on behalf of Venezuela and of the Monroe Doctrine. Lord Salisbury receded from his refusal to arbitrate the boundary question and, in February 1897, a treaty of arbitration was entered into between Great Britain and Venezuela, by which the whole subject was referred to an international tribunal of five members, two of whom were to be appointed by the Supreme Court of the United States, two by the Supreme Court of Great Britain, the treaty providing that the arbitrators so appointed might be members of those courts respectively; the fifth, was to be appointed either by the four others, or if they could not agree (as was the case) by the King of Norway and Sweden, who subsequently appointed the eminent Russian jurist, Frederic de Martens.

The treaty gave a wide scope, but laid down certain rules to be regarded as principles of international law to guide the arbitrators in regard to prescriptive title and occupancy of territory.

The Supreme Court of the United States named Chief Justice Fuller and, as the work of the commission had been suspended, Mr. Justice Brewer. The Supreme Court of Great Britain named Baron Hershel, who died before the arbitration took place, and, in his place, Lord Chief Justice Russell of Killowen, and Sir Richard Henn Collins, Lord Justice of Appeals.

The tribunal met in Paris in the summer of 1889, and on October 3, after listening to arguments of eminent counsel, including ex-President Harrison on behalf of Venezuela, and Sir Richard Webster, on behalf of Great Britain, made an award finally settling a boundary controversy which had periodically threatened the amicable relations of three nations during more than half a century. The award was acquiesced in by both of the principals to the controversy, and the fact that the extreme claims of Great Britain were not allowed, but a large portion of the territory claimed by the weaker nation was, after an exhaustive examination by five eminent jurists, saved to it, was a complete vindication of the attitude assumed by the United States. It was a distinct triumph for the cause of arbitration to which Chief Justice Fuller and Mr. Justice Brewer largely contributed, by devoting so much of their time, energy and ability.

The Venezuelan arbitration was concluded prior to the establishment of the Hague Court, and, when in 1899, the First Peace Conference established the Permanent Court and provided for the appointment of four of its members by each of the participating powers, President McKinley promptly appointed eminent representatives of this country, heading the list with the Chief Justice of the United States.

Of the nearly two hundred jurists appointed to that court by the participating powers since it was first organized, including those added after the accession, in 1907, of the South American powers, less than twenty-five have been called upon to act in the eight arbitral proceedings that have come before it.

During the ten years that his name was on the list of judges, Chief Justice Fuller was requested to act no less than three times, but was only able to serve on one occasion. He was unable to act at the instance of the Japanese Government in the Window Tax case, and, just before his death, he had been asked to act as arbitrator in a case between two American powers which will probably be referred to that court or otherwise settled by arbitration.

He was, however, named as one of the judges, and accepted and served, in the case of the Muscat Dhows in 1904.

Differences having arisen between Great Britain and France as to the right of the latter to grant the protection of its flag to vessels belonging to subjects of the Sultan of Muscat, and great trouble having arisen under the Brussels Slave Trade Act, by reason of the claims to immunity from search made by Muscat owners of Dhows flying the French flag, the matter was referred to a Hague tribunal of three members. Great Britain appointed the Chief Justice of the United States, France appointed Jonkherr Savornin-Lohman, an eminent professor of Holland; Prof. Heinrich Lammasch of the University of Vienna was named as third arbitrator and president of the tribunal. Both of the Chief Justice's colleagues in the Muscat Dhows case were, at the time of his death, sitting as members of the court at The Hague on the fisheries dispute between this country and Great Britain.

The court sat at The Hague in the summer of 1904 and considered a number of intricate questions involving the rights and duties under the Brussels Slave Trade Act of 1890, as well as other treaties and declarations relating to the suppression of slave traffic, to the sovereignty of the Sultan of Muscat and the definition of the word "protected" (*protegé*) as used in the treaties and acts. It pronounced an arbitral

sentence by which all of those questions were satisfactorily settled, and the limitations as to the power to grant privileges of its flag to native vessels by a signatory to the Brussels Act were carefully defined. The sentence also involved the extent to which a treaty exemption from search in the homes of natives of a protected state extended to their vessels.

It was not only as judges of international tribunals, however, that Chief Justice Fuller and Mr. Justice Brewer rendered decisions and delivered opinions on questions of international law. On more than one occasion each has stated in his judicial utterances, that "international law is a part of our law and the Supreme Court of the United States, sitting, as it were, as an international, as well as a domestic, tribunal, applies federal law, State law and international law as the exigencies of the case demands."⁶

It frequently happens therefore that in cases before the Supreme Court questions of international law arise and are decided. This is especially true in cases between States over which the Constitution wisely gave that court jurisdiction, thus not only creating a court of international justice for the States of this Union, but one which may well serve as an example for that court of arbitral justice which eventually must be established, and whose jurisdiction will extend over the sovereign nations of the world.

Among the cases involving questions of international law lately determined and in which both the Chief Justice and Mr. Justice Brewer participated, one or the other delivering the opinion, are those of *Kansas v. Colorado*,⁷ *Virginia v. West Virginia*, *Louisiana v. Mississippi*,⁸ *Wright v. Henkel*,⁹ prize cases of the Spanish War, and the cases involving the construction of the treaty of peace that terminated that unfortunate but unavoidable episode.

The case of *Kansas v. Colorado*, brought by the plaintiff State to restrain the defendant from diverting waters of the Arkansas river, was twice before the court. The first occasion was on the argument of Colorado's demurrer to the jurisdiction, which was overruled, the Chief Justice writing the opinion (185 U. S. 125). In answer to Colorado's

⁶ Mr. Justice Brewer in *Kansas v. Colorado*, 206 U. S. 46, p. 97, citing Chief Justice Fuller in an earlier decision in the same case 185 U. S. 125, p. 146.

⁷ Printed in JOURNAL, 1:215.

⁸ Printed in JOURNAL, 1:204.

⁹ Printed in JOURNAL, 1:202.

contention that "only those controversies are justiciable in this court which, prior to the Union would have been just cause for reprisal by the complaining State and that according to international law reprisal can only be made when a positive wrong has been inflicted or rights *stricti juris* withheld" he asked:

But when one of our States complains of the infliction of such wrong or the deprivation of such rights by another State, how shall the existence of cause of complaint be ascertained, and be accommodated if well founded? The States of this Union cannot make war upon each other. They cannot "grant letters of marque and reprisal." They cannot make reprisal on each other by embargo. They cannot enter upon diplomatic relations and make treaties. * * * The publicists suggest as just causes of war, defense, recovery of one's own, and punishment of an enemy. But as between States of this Union, who can determine what would be a just cause of war? And, applying the principles settled in previous cases, we have no special difficulty with the bare question whether facts might not exist which would justify our interposition.

He disposed of the suggested difficulty as to determining the law of the case by declaring that in such cases the court sat as it were as an international as well as a domestic tribunal.

The demurrer was overruled and when the case came again to the court Mr. Justice Brewer wrote the opinion. He reiterated the above proposition, citing the remarks of the Chief Justice to the effect that the court in such a case sat as an international court and applied international law. The proposition that a State might have a right to prevent another State from wholly diverting the water of interstate streams was sustained, but the court was of opinion that Kansas had not demonstrated that it had been sufficiently deprived of the waters of the river to justify the interposition of the court and the bill was dismissed without prejudice.

When West Virginia became a separate State in 1863, Virginia was heavily indebted on its State bonds, and, in 1907, after more than forty years of ineffectual negotiations with its offspring to adjust and divide responsibility, it filed its bill in the Supreme Court of the United States to compel West Virginia to assume or pay a portion of that indebtedness. West Virginia demurred on various grounds and denied the jurisdiction of the court. The leading argument for that State was made by Mr. John G. Carlisle, who, like three of the justices participating in the decision, has not lived to see the conclusion of the case.

The Chief Justice after an elaborate statement of the case, sustained the jurisdiction of the court, and, disposing of all the other matters

raised by it, overruled the demurrer. The case was sent to a master to take testimony and is now before the court for final hearing.

After the "Oyster Wars" in the disputed waters of the Gulf of Mexico, Louisiana filed its bill in the Supreme Court of the United States against the State of Mississippi to determine the boundary line. The Chief Justice delivered an opinion (202 U. S. 1), largely sustaining the contentions of Louisiana and applying the doctrine of the *thalweg* — the deepest channel. Up to that time, the rule of the *thalweg* had been applied to rivers, but in this case, the court was (p. 50) "of the opinion that, on occasion, the principle of the *thalweg* is applicable in respect of water boundaries to sounds, bays, straits, gulfs, estuaries and other arms of the sea," in fact, wherever there is a deep water sailing channel, the rule applies.

The question of prescription was also involved and the Chief Justice reiterated the rule many times held by the court that as

Between States of the Union, acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both.

Wright v. Henkel (1903, 190 U. S. 40), was a *habeas* proceeding in which the appellant Whitaker Wright sought to be discharged in extradition proceedings on the ground that the statutory crime of forgery by alteration of papers for which he was indicted in England was not a crime at common law or by Act of Congress or by preponderance of the statutes of the States. The Chief Justice, speaking for a unanimous court, declared that treaties must receive a fair interpretation according to the intention of the parties, and, while under the general rule of international law, the offense for which extradition is asked must be made criminal by the law of both countries, in this case, as the act charged was a crime in Great Britain and also in New York, where the arrest was made, the fugitive could be extradited. Wright was remanded, taken back to England, where he pleaded not guilty, was tried and convicted. The trial was a sensational one, and, when the jury brought in a verdict of guilty, Wright immediately swallowed some poison with which he had armed himself in case of such a result, and which was of such powerful potency that he expired in the court room.

War always creates material for courts both national and international, and the Spanish-American War was no exception. While, owing

to the brief period of belligerency, there were far fewer prize cases than during the Civil War, those that were brought to the court involved large sums and great principles of law. Chief Justice Fuller delivered the opinion of the court in several of these cases, notably in the *Carlos F. Roses* (177 U. S. 655), where by a divided court the cargo of the vessel was condemned on the ground that its *ante-bellum* Spanish character had not been changed by an attempted transfer through endorsement of the bills of lading to a neutral, and, as the vessel was an enemy vessel, the presumption was that the cargo was enemy property also, and this could only be overcome by clear and positive evidence to the contrary. Mr. Justice Brewer joined in a dissent written by Mr. Justice Shiras.

In the *Pedro* (175 U. S. 354), the Chief Justice spoke for the court for condemnation of a Spanish vessel as not being exempted under the proclamation of April 26, she being in a Spanish, and not an American port, at that time and having been subsequently captured on the high seas. The case was a hard one but a majority of the court considered that the exemption did not apply under the strict rule of war and that the vessel was lawful prize. Mr. Justice Brewer in this case also united in the dissent which was written by Mr. Justice White, the contention of the minority being that under the circumstances the condemnation deprived the vessel of the protection intended by the proclamation, which should have been carried out according to the commendable principles of honesty and humanity now enforced by all civilized nations at the outbreak of war.

In the *Benito Estenger* (176 U. S. 568) the Chief Justice delivered the opinion, in which Mr. Justice Brewer concurred, affirming the condemnation of a vessel as enemy property including in that term "property engaged in illegal intercourse with the enemy, whether belonging to an ally or a citizen, as the illegal traffic stamps it with the hostile character and attaches to it all the penal consequences."

The Chief Justice delivered the opinions also in the cases of the *Manila Prize Money* (188 U. S. 254) and in the *Infanta Maria Theresa* (188 U. S. 283), but they were cases involving the construction of federal statutes concerning distribution of prize money rather than principles of prize under international law.

After the termination of the war by the treaty of peace in December 1898, many questions arose as to the construction of that treaty and the rights of persons and property affected thereby, and in several

cases of this nature the Chief Justice expressed the views of the court. In *Gonzales v. Williams* (192* U. S. 1) he announced the unanimous opinion, against the contention of the Government, which had succeeded below, that whatever might be the citizenship status of a woman coming from Porto Rico and who had been excluded from entering the port of New York under the alien immigrant law, she was not an alien and the Act was inapplicable to her case.

In the case of *Ponce v. Roman Catholic Church* (210 U. S. 296) he showed by an historical review of cases and precedents that the Roman Catholic Church was a juridical person whose property was entitled to protection under the terms of the treaty.

These are but a paltry few of the cases decided and opinions delivered by these two jurists. It would involve an examination of between seventy-five and a hundred volumes of reports to give them all: the few that are cited have been selected to show what broad subjects they were called upon to consider and how they were able to meet the great questions involved as they arose.

It is impossible to attempt to estimate the weight of their utterances and the effect they will have in future years, but it certainly can be said that these men assisted in developing in accordance with good conscience and in the right direction, the great body of legal principles with which they dealt in administering justice between their fellow men, and no one can deny that each fulfilled both in letter and spirit the oath which he took on his accession to the bench "to administer justice without respect to persons, do equal right to the poor and to the rich and to faithfully discharge the duties incumbent upon him."

But there is another phase of the lives of these men which deeply impressed all who knew them intimately. There was a divinely human side to each. The hand that could without a tremor sign the decree that settled the fate in the pending controversy of man or State or nation could yet reach forth and hand a cup of cold water to the least who needed it. There was intellect, but there was heart also; each was a consistent and zealous Christian, in private life as well as in the church; and each held high office in his own denomination.

Each recognized his duty to his fellow man and did his best to fulfil it.

Notwithstanding their arduous labors on the bench each found some time to devote to the affairs of their fellow men. The Chief Justice gave a full quota of attention to the Smithsonian Institution, of which

he was the chancellor, and to the Peabody Education Fund, of which he was a trustee; Mr. Justice Brewer for years acted as president of the charity organization of our capital city. Each could well and truly have said for himself

I live for those who love me
Who know me well and true,
For the Heaven that smiles above me
To receive my spirit too.
For the wrong that need resistance,
For the right that need assistance,
For the future in the distance,
For the good that I may do.

Of all the utterances from the presiding officer of that highest court in the land — and they have been many and have been pronounced in cases of far-reaching importance and involving great principles — none have left a deeper impression on the writer than the words which he uttered with heart-felt and throbbing emotion in response to the remarks of the Attorney-General on presenting the resolutions of the bar on the death of Mr. Justice Brewer. He voiced the sentiments of all those who knew that Justice intimately when he declared "that it was not his magnificent judicial labors but the ineffable sweetness of his disposition that chiefly impressed itself upon us." Surely the same words can apply to the Chief Justice himself, and there can be no words more fitting, as to both of its subjects, with which to close this article than those in which, on the same occasion, the survivor paid a beautiful and affectionate farewell to the loved brother and colleague who had preceded him. "It has been my sad duty," he said in further response to the Attorney-General,

to accept for the court tributes of the bar in memory of the many members of this tribunal who have passed to their reward. As our Brother Brewer joins the great procession, there pass before me the forms of Matthews and Miller, of Field and Bradley and Lamar and Blatchford, of Jackson and Gray and of Peckham, whose works follow them now that they rest from their labors. They were all men of marked ability, of untiring industry, and of intense devotion to duty, but they were not alike. They differed "as one star differs from another star in glory." Their names will remain illustrious in the annals of jurisprudence. And now we are called on to deplore the departure of one of the most lovable of them all.

He died suddenly, but not the unprepared death from which we pray to be delivered. When the unexpected intelligence was conveyed to me I could not but think of Mrs. Barbauld's poem on "Life," and seemed to hear our dear friend exclaim —

Life! we've been long together,
Through pleasant and through cloudy weather;
'Tis hard to part when friends are dear;
Perhaps 'twill cost a sigh, a tear;
Then steal away, give little warning,
Choose thine own time;
Say not good night, but in some brighter clime
Bid me good morning.

"Even so" — and in the same affectionate spirit let us say of them both — "*They rest from their labors and their works do follow them.*"

THE FOURTH INTERNATIONAL AMERICAN CONFERENCE

The Fourth International Conference of the American Republics held its meetings in the city of Buenos Aires in July and August. The date of the conference is memorable as coinciding with the celebration of the centenary of Spanish American independence. Among all the features of the celebration of this great historical event there stands out prominently the meeting of representatives of the American republics for the discussion of the common interests of all America. The motions of homage and of condolence which were adopted by the conference well express the feeling of a common destiny and the mutual sympathy that animates the republics. The death of the great Chilean statesman and leader, President Montt, as well as the disaster which recently befell Costa Rica, when Cartago was destroyed by an earthquake, gave rise to a spontaneous and dignified expression of the common participation in such sorrows. On the other hand, on the different dates when individual American republics commemorated their independence there came an eloquent expression of the common pride in historic achievements, and the appreciation of how strongly the American republics are bound together through the course which their development has taken. The commemoration of the centenary is, according to a resolution of the conference, to take a visible form in the American products exhibition to be founded and maintained in Buenos Aires through cooperation among all the countries of America.

Turning to the work performed by the conference in the development of international administrative law, we encounter the fact that expectations are often entertained in relation to international conferences which in the nature of things are not justified. It is the purpose of a general international conference to determine a basis upon which

unanimous or almost unanimous action may be had. It can not in the space of a few weeks solve all political questions of an international nature, far less can it reform the world by entering into and attempting to deal with the domestic problems of different nations. The Fourth Pan-American conference did not escape the unfavorable criticism born of such unpracticable views; but it must also be said that the responsible press of South America, when it came to consider the results of the conference, showed a high degree of appreciation of the exact nature of the work which these great international meetings can perform. The conference itself waived all purely doctrinaire discussions and dedicated itself from the start to the practical solution of specific problems. It was not, indeed, unmindful of the great principles which underlie the solidarity of America. To these, eloquent expression was given from old and new points of view; but it was the unmistakable feeling among the delegates assembled that the relations of the American republics to each other were well enough settled as regards their general character, to enable the continental conference to pass on to the order of the day and to transact the specific business before it. Isolated speeches involving a different conception were quietly listened to and respectfully consigned to the printed minutes of the conference. The practical character of the work to be done was emphasized through the reports made by the different governments, which indicated that since the last conference far more ratifications of Pan-American treaties had been made than ever before.

The work of the conference is embodied in four conventions and twenty resolutions, aside from the motions of a congratulatory and commemorative nature. A draft convention was also adopted embodying the organic law of the Pan-American Union in Washington. The conventions cover such important subjects as patents, trade-marks, copyrights and pecuniary claims; while the resolutions deal with the organization of the Pan-American Union, inter-American steamship service, consular and customs regulations, census and statistics, the Pan-American Railway, sanitary police, the interchange of university professors and students, and the opening of the Panama Canal. Further resolutions express the thanks of the republics to Mr. Andrew Carnegie for his munificent donation towards the Pan-American Building and deal with the work of the Pan-American Scientific Congress. The permanent results embodied in, and to be expected from, this work are discussed in an article in this JOURNAL.¹

¹ Page 777.

The Fourth Pan-American Conference has given a new and strong expression to the solidarity existing among American countries. It is a notable fact that at a time when a great many differences separated the governments of individual countries, they could yet meet together and in perfect mutual confidence cooperate in the solution of many specific problems of American international life. All the prophets of evil came to grief. As the delegates became acquainted with each other a strong feeling of mutual confidence and of security grew up, so that alarmist reports and forecasts were heard with equanimity and amusement. The International Union of American Republics may indeed be said to be well established when its work can be done in this quiet and effective manner — a manner which involves a sincere mutual confidence and a feeling that the bases upon which our common action rests are well settled by convention, custom, and intimate mutual understanding.

THE ANNEXATION OF KOREA TO JAPAN

In an editorial comment which appeared in the JOURNAL in April, 1907, the international status of Korea was considered, with a review of the changes which had taken place in the Hermit Kingdom from 1876 to 1906. As a result of an examination of the various treaties between Korea and Japan, the view was expressed that Korea had surrendered its independence and that it ceased to be a member of the family of nations; for, by the treaty of November 17, 1905, Japan took charge of the external relations of Korea, which agreed not to conclude any act or engagement of an international character, except through the intermediary of Japan. The establishment of the Residency-General and Residents in Korea by the Japanese Imperial Ordinance No. 267, promulgated December 20, 1905, was a natural consequence and logical development of the status created by the treaty of November 17, 1905. For an examination of the successive acts by which Japan assumed sovereignty over Korea, see the editorial comment referred to above, Vol. 1, pages 444-449.

It would seem that the agreement of 1905 and the government established in accordance therewith, have not worked satisfactorily, and on August 29, 1910, Japan and Korea concluded a treaty by which Korea was formally annexed to Japan. The agreement of 1905 was in fact, if not in theory, virtual annexation, but the treaty of August 29, 1910, annexes Korea and incorporates it with the Japanese Empire under the

name of Chosen. The proclamation of Japan annexing Korea, dated August 29, 1910, stated that, "in order to maintain peace and stability in Korea, to promote the prosperity and welfare of Koreans, and at the same time to insure the safety and repose of foreign residents," it was necessary to make fundamental changes in the government of the country, and in order to effectuate this purpose the complete annexation of Korea was agreed to by the high contracting parties. The preamble of the treaty of annexation stated it as the desire of both countries "to promote the common weal of the two nations and to assure permanent peace in the Extreme East," and that the best method to attain these purposes was the annexation of Korea to Japan.

The important articles of this important treaty are the following:

Article I. His Majesty the Emperor of Korea makes complete and permanent cession to his Majesty the Emperor of Japan of all rights of sovereignty over the whole of Korea.

Article II. His Majesty the Emperor of Japan accepts the cession mentioned in the preceding article and consents to the complete annexation of Korea to the Empire of Japan.

For the purposes of administration, a governor-general of Korea is to be appointed, who is, under Japanese direction, to exercise "the command of the army and the navy and the general control over all administrative functions in Korea." In the Japanese proclamation annexing Korea, particular attention is devoted to matters relating to foreigners and foreign trade in Korea. Existing Japanese treaties are to be extended as far as practicable to Korea to take the place of Korean treaties which have ceased to be operative. Foreigners residing in Korea are, as far as conditions permit, to enjoy the same rights and immunities as in Japan and the protection of their rights is subject to Japanese jurisdiction. However, cases actually pending in any foreign consular court in Korea at the time of the treaty of annexation shall remain in said court until final decision. For the treaty of annexation, the proclamation of annexation, the Imperial rescript attached to the proclamation and treaty of annexation, and the announcement of the Japanese Foreign Office, all of which are dated August 29, 1910, see SUPPLEMENT, p. 1.

The absorption of Korea is thus complete. It has ceased to exist as a nation and has even surrendered the name by which it was known in the family of nations. The situation in Korea has been a cause of trouble and difficulty in the Far East for many years, whether as a

dependency of China or as an independent but struggling kingdom, exposed to designs on the part of its powerful neighbors, Russia and Japan. The protectorate created by the agreement of 1905 was but a step toward the absorption of the kingdom. It indicated clearly the ultimate intention of Japan, but it did not wholly subject it to the administrative control and domination of the protector. The formal annexation of Korea will no doubt be regretted by the Koreans who desire its independence, but there can be little doubt that its annexation will, in the language of the Japanese proclamation, "maintain peace and stability in Korea and promote the prosperity and welfare of Koreans, and at the same time insure the safety and repose of foreign residents."

"EL CHAMIZAL" DISPUTE BETWEEN THE UNITED STATES AND MEXICO

The announcement some time since that Mexico has accepted Secretary Knox's proposal for the arbitration of the long-pending controversy between the United States and Mexico over the international boundary at El Paso, Texas, would seem to promise an early solution of the only important boundary dispute now existing between the two countries concerned. The agreement provides that the matter is to be referred to the International Boundary Commission, now composed of two commissioners — one of whom this Government appoints and the other Mexico — which is to be augmented for the sole purpose of determining the international title to the land in dispute by the addition of a third commissioner who is to act as umpire and preside over the deliberations of the commission. This commissioner is to be a Canadian jurist, to be selected by the two governments, acting in common accord, or failing such agreement, to be appointed by the Government of the Dominion of Canada, and the decision of this commission upon the title to the land in dispute is to be final and conclusive.

The land involved in the dispute referred to, estimated at some six hundred acres, is within the so-called *El Chamizal* tract, which lies south of the channel of the Rio Grande as it ran in 1853 and north of the present channel of the river. Under the treaties of 1848 and 1853, which will be later discussed in detail, the Rio Grande from its mouth until it passes El Paso, Texas, forms the international boundary line between the United States and Mexico, and it is by virtue of certain provisions of these treaties that the people of Texas lay claim to the land in question, the said Chamizal tract lying wholly north, i. e., on the American side of the river as it now flows.

For many years past this strip of land has been considered by the inhabitants of Texas generally, and El Paso in particular, as a part of the public domain of that State and therefore titles thereto have been granted from time to time by that State to American citizens; the United States Government has erected thereon a custom-house and immigration station; the city authorities of El Paso have erected school houses; the tracks as well as stations and warehouses, of American owned railroads and street railways have been placed thereon, and, in addition, it is said more than one thousand American citizens reside upon this Chamizal tract, over which for many years past the authorities of El Paso and of the State of Texas have exercised both civil and criminal jurisdiction.

In order that the international boundary between the United States and Mexico might be fixed, the two interested powers, on February 2, 1848 — at the close of the Mexican war — concluded the treaty of Guadalupe Hidalgo, Article V of which reads, in part, as follows:

The boundary line between the two Republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel. * * *

In 1853, in order, as stated in the preamble,

to remove every cause of disagreement, which might interfere in any manner with the better friendship and intercourse between the two countries; and especially, in respect to the true limits which should be established, when notwithstanding what was covenanted in the treaty of Guadalupe Hidalgo in the year 1848, opposite interpretations have been urged,

the two Governments negotiated what is known as the Gadsden Treaty, Article I of which provides, in part, that

* * * the limits between the two Republics shall be as follows: Beginning in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande as provided in the fifth article of the treaty of Guadalupe Hidalgo, thence as defined in the said article, up the middle of that river to the point where the parallel of 31° 47' north latitude crosses the same, * * *

(The latitude named is a point just above the City of El Paso.)

Again, in 1884, these two republics "in order to avoid difficulties which may arise through the changes to which those rivers (Rio Grande and Colorado) are subject through the operation of natural forces,"

negotiated another boundary convention. Pertinent provisions of this treaty read as follows:

ARTICLE I.

The dividing line shall forever be that described in the aforesaid treaty and follow the center of the normal channel of the rivers named, notwithstanding any alterations in the banks or in the course of those rivers, provided that such alterations be effected by natural causes through the slow and gradual erosion and deposit of alluvium and not by the abandonment of an existing river bed and the opening of a new one.

ARTICLE II.

Any other change, wrought by the force of the current, whether by the cutting of a new bed, or when there is more than one channel by the deepening of another channel than that which marked the boundary at the time of the survey made under the aforesaid treaty, shall produce no change in the dividing line as fixed by the surveys of the International Boundary Commissions in 1852, but the line then fixed shall continue to follow the middle of the original channel bed, even though this should become wholly dry or be obstructed by deposits.

ARTICLE III.

No artificial change in the navigable course of the river, by building jetties, piers, or obstructions which may tend to deflect the current or produce deposits of alluvium, or by dredging to deepen another than the original channel under the treaty when there is more than one channel, or by cutting waterways to shorten the navigable distance, shall be permitted to affect or alter the dividing line as determined by the aforesaid commissions in 1852 or as determined by Article I hereof and under the reservations therein contained; but the protection of the banks on either side from erosion by revetments of stone or other material not unduly projecting into the current of the river shall not be deemed an artificial change.

In a subsequent boundary convention (1889) the two governments agreed to submit to an International Boundary Commission, to be composed of two commissioners, one to be appointed by the President of the United States and the other by the President of the United States of Mexico,

All differences or questions that may arise on that portion of the frontier between the United States of America and the United States of Mexico where the Rio Grande and the Colorado rivers form the boundary line, whether such differences or questions grow out of alterations or changes in the bed of the aforesaid Rio Grande and that of the aforesaid Colorado river, or of works that may be constructed in said rivers, or of any other cause affecting the boundary line, * * * for examination and decision.

On October 29, 1894, the Mexican Minister for Foreign Affairs (Mr. Mariscal) presented to the International Boundary Commission, appointed under the provisions of the above mentioned convention, the case of Pedro Y. Garcia. The sole question involved in this case, "is," as stated in the Joint Journal of the Commission of November 6, 1895, "whether or not the river in its passage moved over the land (from the Mexican to the American side of the Rio Grande River) by gradual erosion from the Mexican bank and deposit on the United States bank, as described in Article I of the treaty of 1884, or by sudden avulsion, by cutting a new bed or deepening another channel than that which marked the boundary. In the former case the present channel of the river to be the boundary, or in the latter the boundary to be established in the old channel though it be dry."

In its Joint Journal of December 4, 1897, the Commission say:

* * * the Commissioners have deemed it their duty to jointly suggest in this journal to their respective governments, that in accordance with the spirit of Article 21 of the Treaty of Guadalupe Hidalgo, signed February 2, 1848, that the two Governments agree upon and appoint a third Commissioner, not a citizen of either the United States or Mexico, to meet the two present Commissioners, and hear from them both sides of the question at issue, and act as arbiter wherein the present Commissioners are unable to agree. (Proceedings of the International [Water] Boundary Commission, vol. 1, pp. 94 and 95.)

The Garcia case was the first and last one involving title to land within the Chamizal tract which has been presented to the International Boundary Commission, and the situation has, therefore, remained unchanged, although the matter has not been allowed to slumber owing to the action of those claiming ownership to lands within the Chamizal tract under Mexican titles, on the one hand, and those claiming the same land under American titles, on the other, the former trying to locate or remain thereon and the latter endeavoring to prevent or oust them by legal process or otherwise.

The question has at one time or another during the past several years been brought to the attention of the courts of this country, but each time the American titles have been upheld therein. In two cases involving title to this property (*Warder v. Loomis* [197 U. S. 619] and *Cotton v. Warder* [207 U. S. 583]) in which the lower courts decreed against the Mexican claimants and in favor of American titles, the Supreme Court of the United States has dismissed the cases for want of jurisdiction. In the former case, which involved title to land

within the disputed Chamizal tract, the United States Circuit Court for the Western District of Texas decided that because the admitted facts and the evidence show that the United States Government and the Government of the State of Texas are, and for many years have been, exercising jurisdiction, civil and political, over the property in question, the fact was established for the purposes of said case that the change in the river by which the land in question was placed on the north side of the Rio Grande River was by accretion, and not by avulsion.

However, since 1907, the courts of this country have refused to take jurisdiction of cases involving title to lands within the Chamizal tract owing to the attitude taken by our national executive which was in turn based upon the position adopted by the Mexican Government that the matter was not a national but an international one, and that, therefore, until finally adjudicated, the courts of neither country were authorized to pass upon the merits of titles derived from either government. This action upon the part of our federal departments and courts is alleged by American claimants to have resulted in a hardship to those claiming land in the Chamizal tract because as they state many irresponsible squatters have taken possession without a vestige of right or title. This state of affairs became so vexatious that Secretary Knox proposed to the Mexican Government the following *modus vivendi* regulating these matters, to which the Mexican Government has assented:

The Government of the United States is to continue to request in the courts the stay of proceedings in cases of persons showing that they are claiming under *prima facie* Mexican title, and that they or their predecessors in interest were in actual occupation of land in the Chamizal tract on March 15, 1910. No other persons are to receive protection at the hands of the United States, but as to all others, the ordinary judicial processes are to take their course.

In order that the United States may intervene in behalf of persons properly entitled under this arrangement, the Department of State is to appoint an officer who shall be authorized to pass upon the question of the existence of *prima facie* Mexican titles and of actual possession under such titles on March 15, 1910, and to report to the Department of State cases wherein ejectment proceedings should be stayed by virtue of international comity and in accordance with the arrangement with Mexico.

Thus it would seem that in addition to providing for the ultimate determination of international title to El Chamizal, the two interested powers have amicably arranged for the amelioration of conditions which for a long time have been a source of considerable annoyance not only to the different parties claiming ownership in the lands comprising El Chamizal tract, but to the two governments as well.

THE AMERICAN SOCIETY FOR THE JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES

The American Society for the Judicial Settlement of International Disputes, organized at Baltimore February 6, 1910, has for its aim and purpose not merely the creation of a permanent tribunal for the judicial settlement of international controversies, but also the creation of public sentiment both at home and abroad in order to compel nations to submit their international disputes susceptible of judicial determination to a permanent international court.

The proposed international tribunal is to be permanent, composed of judges who have already had judicial experience or who are lawyers of standing and approved training. The court is to be established at The Hague and is to be permanent, that is to say, it is either to be permanently in session at The Hague, or so permanently composed that its judges may assemble in order to decide promptly and impartially any case submitted to its consideration of which it has jurisdiction, either by a general treaty of arbitration or a special agreement of the litigating nations.

The proposed court differs radically from the so-called permanent court of The Hague. It is not, however, the desire of the society to replace the alleged Permanent Court of Arbitration, but to advocate the creation in addition thereto of a truly permanent tribunal. The creation of the so-called Permanent Court of Arbitration at The Hague marked a great era in the world's progress, although it is merely a panel of judges from which a temporary tribunal may be created for the consideration of any particular case submitted. This panel of judges is composed of persons, often diplomats by profession, and consists of not more than four selected by each nation to serve for a period of six years. From the persons so selected a temporary tribunal of from three to five is constituted for each case submitted to its arbitration. The practical application of this method has developed several

serious defects. There are necessarily delay and expense in constituting a temporary tribunal for each individual case. However, the greatest objection is the diplomatic character of the judges for they naturally decide a question submitted to them according to the ethics of their profession and not from the purely legal standpoint. The decision is thus likely to be a compromise instead of the cold and passionless application of a principle of law to the facts involved in the controversy. This objection has been clearly pointed out by the Hon. Elihu Root in a letter, from which a quotation is made, to the organizers of the American Society for the Settlement of International Disputes:

I beg to say to your guests that I sympathize very strongly with their object and believe that the proposed organization is adapted to render a great public service. I assume that the new organization is to have a definite, specific object which may be indicated by emphasizing the word "judicial" in its title to indicate a distinction between that kind of settlement of international disputes and the ordinary arbitration as it has been understood in the past and is generally understood now.

I assume that you are going to urge that disputes between nations shall be settled by judges acting under the judicial sense of honorable obligation, with a judicial idea of impartiality, rather than by diplomats acting under the diplomatic ideas of honorable obligation and feeling bound to negotiate a settlement rather than to pass without fear or favor upon questions of fact and law.

The proposed permanent international tribunal is free from these objections, and has many positive advantages to commend it. In the first place, it is permanently constituted, whether or not the individual judges reside at The Hague or are summoned when a case arises. Secondly, it is composed of judges who bring to the determination of the case the standards of judges and the legal attainments of the bar. Thirdly, the expenses of the court other than the individual expenses of the litigants, are borne by the family of nations, not by the parties in controversy.

It is at once evident that a court permanently composed and permanently in session, if need be, will prove of inestimable service in the judicial development of international law, and that each decision will be regarded as a precedent for subsequent decisions, so that the common law of nations will be developed as scientifically and as unerringly as the common law of England has been developed by professional judges. There will thus be continuity in its decisions, which can not well be the case with a temporary tribunal whose decisions have no binding effect upon another and a distinct temporary tribunal composed of different judges.

The advisability, indeed the necessity for the establishment of such a permanent tribunal is too clear to need argument, and it is a source of gratification that the Secretary of State of the United States, the Honorable Philander C. Knox, recently proposed in a circular letter addressed to the powers, the establishment of such a tribunal,¹ and the responses to the circular letter have been of such a favorable nature as to justify the expectation that such a tribunal will be established and in operation at The Hague in the very near future. It is also a matter of pride that the President of the United States, the Honorable William Howard Taft, has given his hearty approval to this suggestion and addressed the following communication to the organizers of the American Society for the Judicial Settlement of International Disputes:

I have learned with interest of the plans to found an "American Society for the Judicial Settlement of International Disputes."

The leaflets which you propose to publish, together with the meetings of national scope which you are planning to hold from time to time, may have a very great influence on the development of public opinion on this important subject. If the proposed court of arbitral justice at The Hague becomes an accomplished fact there will still remain the task of securing the adhesion of a number of powers to the court, and the very important task of so cultivating opinion in various countries as to incline governments to resort to the court when occasion calls for it. There is no other single way in which the cause of peace and disarmament can be so effectively promoted as by the firm establishment of a permanent international court of justice.

The American Society for the Judicial Settlement of International Disputes is to confine itself strictly to the establishment of an international court of justice and to the creation of international opinion for the submission of international controversies to the court when established. Its aim and scope are thus clearly announced and defined. It will heartily cooperate with all of the peace and arbitration societies, and supplement their work by the establishment of a tribunal in which international controversies may be determined by judicial means.

The Society believes that arbitration can only be made acceptable to the nations at large and perform its great and beneficent mission by being made judicial.

The Secretary of the Society is Mr. Theodore Marburg of Baltimore, Maryland.

¹ The circular letter will be found in the SUPPLEMENT to this JOURNAL for January, 1910, p. 102. See also editorial comment on the same subject in the January number of the JOURNAL, p. 163.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Arch. dipl.*, Archives diplomatiques, Paris; *B.*, boletín, bulletin, bollettino; *B. A. R.*, Monthly bulletin of the International Bureau of American Republics, Washington; *Doc. dipl.*, France: Documents diplomatiques; *Dr.*, droit, diritto, derecho; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Gd.*, Great Britain: Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *Mém. dipl.*, Mémorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *N. R. G.*, Nouveau recueil général de traités, Leipzig; *Q. dipl.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs-G.*, Reichs-Gesetzblatt, Berlin; *Staatsb.*, Staatsblad, Gröningen; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, the Times (London); *Treaty ser.*, Great Britain: Treaty Series.

February, 1910.

- 26 NORWAY—RUSSIA. Arrangement signed at Christiana, February 4 and at St. Petersburg, February 26, modifying the particular arrangement of February 3/ January 22, 1897, concerning telegraphic relations between the two countries. *Arch. dipl.*, 114:175.

March 1910.

- 1 GERMANY—SWEDEN. Declarations exchanged at Stockholm, February 5, 1910, to simplify the formalities of judicial procedure, become effective. *Arch. dipl.*, 114:176.
- 15 BOLIVIA—GERMANY. Exchange of ratifications of the treaty of amity and commerce signed at La Paz, July 22, 1908. *Arch. dipl.*, 114:161.
- 24 GREECE—SPAIN. Exchange of ratifications at Athens of an arbitration convention signed at Athens, December 3/16, 1909. *Ga. de Madrid*, April 10, 1910.

April, 1910.

- 22 INTERNATIONAL ART EXPOSITION opened at Venice. It will close October 1. *R. of Reviews*, 41:604.

May, 1910.

- 4 FRANCE—RUSSIA. Law signed by President Fallières approving arrangement signed at Paris, January 22, 1910, and at St. Petersburg, October 24, 1909, to regulate telegraphic communication between the two countries. *J. O.*, May 7. Decree fixing date in same issue.
- 5 FRANCE—LUXEMBURG. Decree promulgating the arrangement signed at Paris, February 22, 1910, reducing the rates on letters exchanged between the two countries. Ratifications were exchanged at Paris, May 5. *J. O.*, May 7; *Arch. dipl.*, 114:173.
- 5 GREAT BRITAIN—UNITED STATES. Exchange of ratifications at Washington of the treaty regarding the boundary waters between the United States and Canada signed at Washington, January 11, 1909. Ratification advised by the Senate, March 3, 1909; ratified by the President, April 1, 1910; by Great Britain, March 31, 1910; proclaimed, May 13, 1910. *U. S. Treaty ser.*, No. 548; *Stat. at L.*, Vol. 36; Supplement to this JOURNAL for July, 1910, p. 239.
- 5 NOBEL PRIZE ADDRESS was delivered by Theodore Roosevelt. Subject: International Peace. *Times*, May 6; *Outlook*, 95:19, 52; *Independent*, 68:1027. *This Journal*, July, 1910, p. 700; *Advocate of Peace*, 72:146.
- 6 FRANCE—SPAIN. Exchange of ratifications at Paris of the convention to regulate telephone service and correspondence between the two countries signed at Paris, December 31, 1909. *Ga. de Madrid*, May 28; *J. O.*, May 10; *Arch. dipl.*, 114:170, text. See April 21.
- 6 GREAT BRITAIN. Death of King Edward VII. *Times*, May 7. May 23 (memorial edition); *Mém. dipl.*, May 15; *North American R.*, 191:721; *Fortnightly R.*, 87:988-1005; *Nineteenth Century and After*, 67:957-968. *The Character of King Edward VII*, *Quarterly R.*, 424:1-32.
- 8 THE CONGRESS OF INTERNATIONAL ASSOCIATIONS opened at Brussels. *Mém. dipl.*, May 15; *R. Economique Int.*, 7:II:199.
- 8-11 THE NEW ENGLAND ARBITRATION AND PEACE CONGRESS met at Hartford. *Advocate of Peace*, 72:125, proceedings and addresses.
- 9 INTERNATIONAL ASSOCIATION OF ACADEMIES met at Rome. *Times*, May 6, 24. The Association was organized at Wiesbaden in

May, 1910.

1889. The first meeting was at Paris, 1901; the second at London, 1904; the third at Vienna, 1907.
- 9 BELGIUM—FRANCE. Ratification of the convention signed at Brussels, December 30, 1908, concerning the delimitation of the Franco-Belgian frontier between Westoutre and Saint-Jans-Cappel. *B. Usuel*, May 9; *Monit. B.*, May 26; *Mém. dipl.*, May 29.
- 9 CHINA. Edict issued setting October 3, 1910, as the date for the opening of the Imperial Senate (Upper House of Parliament). The 91 members represent six classes: (1) princes and nobles of the Imperial clans, fourteen; (2) Manchu and Chinese nobility, twelve; (3) princes and nobles of the dependencies outside of the eighteen provinces, seventeen; (4) the Imperial clansman six; (5) officials of ministries and offices, thirty-two; and (6) eminent scholars, ten. This gives a Manchu preponderance in numbers and influence. *China's Senate and Edict of May 9. North China Herald*, May 13; *Times*, May 30.
- 10 ITALY—MEXICO. Decree of President of Mexico approving the convention relative to direct exchange of postal parcels, signed at Mexico City, December 4, 1909. Text in *Diario Oficial*, May 21.
- 12 FRANCE. Decree promulgating the international radio-telegraphic convention and its annexes, signed at Berlin, November 3, 1906. *J. O.*, May 14, text.
- 13 ANGLO-JAPANESE EXPOSITION opened at London. *Mém. dipl.*, May 1; *Times*, April 1, *et seq.*
- 14-22 INTERNATIONAL CONGRESS OF BOTANY met at Brussels. *R. Economique Int.*, 7:II:202.
- 14 BELGIUM—GERMANY—GREAT BRITAIN. Protocol signed at Brussels arranging for the delimitation of the eastern frontier of the Belgian Kongo. *Times*, May 16; *Mém. dipl.*, May 22. See November 29.
- 15 BRAZIL. The international insurance system for letters and boxes is extended to Brazil. *L'Union Postale*, 35:48, 80.
- 18 BELGIUM—ROUMANIA. Law approving the convention signed at Brussels, April 10, 1910, for the protection of literary, artistic, and photographic works. Text in *B. Usuel*, May 18; *Monit. Belge*, June 15.

May, 1910.

- 18 GREAT BRITAIN. The Imperial Copyright Conference met at the Foreign Office, London. *Cd.*, 5272 (Memorandum of proceedings) *Times*, July 6; "*The Prospects of Copyright*," *do*, July 21.
- 18-20 THE SIXTEENTH CONFERENCE ON INTERNATIONAL ARBITRATION held at Lake Mohonk, New York. *Advocate of Peace*, 72:124; "*A Supreme Court of the World*," *Outlook*, May, 1910; "*Hartford and Mohonk*," *Independent*, 68:1144-5. *This Journal*, July, 1910, p. 689.
- 18-25 WORLD'S CONFERENCE OF THE YOUNG WOMEN'S CHRISTIAN ASSOCIATION held at Berlin. *R. of Reviews*, 41:605.
- 19 TUNIS—TURKEY. Convention signed at Tripoli, regarding the frontier between Tunis and Tripoli. *Mém. dipl.*, May 29; *Q. dipl.*, 14:703.
- 18 INTERNATIONAL AERONAUTIC CONFERENCE opened at Paris. *Times*, May 7, 19; *Mém. dipl.*, June 12.
- 18 SPAIN. Ordinance modifying regulation of foreign corporations. *Ga. de Madrid*, May 18; *B. de Statistique et de Legislation Comparée*, 67:723.
- 19-24 THE WORLD'S SUNDAY SCHOOL ASSOCIATION held its sixth meeting in Washington. *R. of Reviews*, 41:605.
- 20-23 INTERNATIONAL CONGRESS OF TROPICAL AGRICULTURE in session at Brussels. *Times*, May 27; *Mém. dipl.*, May 29; *R. Economique Int.*, 7:II:202.
- 21 GREAT BRITAIN—UNITED STATES. Treaty defining the boundary line in Passamaquoddy Bay signed at Washington. Ratification advised by the Senate, June 6, 1910; ratified by the President, July 13, 1910; ratified by Great Britain, June 23, 1910; ratifications exchanged at Washington, August 20, 1910; proclaimed, September 3, 1910. *U. S. Treaty ser.* No. 551; *Treaty ser.* No. 22, 1910; Supplement to this JOURNAL, p. 000; "*The American-Canada Boundary*," *Outlook*, 95:239; *Times*, May 23.
- 22 FRANCE. Decree issued fixing the rates for certain telephonic communications between France and Germany. *J. O.*, May 26; *Arch. dipl.*, 114:169.
- 23 FRANCE—NETHERLANDS. Law passed ratifying the convention concluded at Paris, December 29, 1909, relating to the extension of existing arbitration treaties. *Staatsb.*, No. 139, 1910; *Mém. dipl.*, May 29.

May, 1910.

- 23 GREAT BRITAIN—NETHERLANDS. Law passed ratifying the convention concluded at London, December 16, 1909, relating to the extension of existing arbitration treaties. *Staatsb.*, No. 139, 1910; *Mém. dipl.*, May 29.
- 30-31 GREAT BRITAIN. The Emigration Conference met at London. *United Empire*, 1:510; *Times*, May 31.
- 31-June 2 FIRST INTERNATIONAL AERIAL LAW CONGRESS met at Verona. *Times*, May 20; *R. générale de dr. int. public*, 17:410.
- 30-June 4 FIFTH ORNITHOLOGICAL CONGRESS held in Berlin. The next congress will be held at Serajevo, Bosnia, in 1915. *Times*, June 7.
- 30-June 4 NINTH INTERNATIONAL HOUSING CONGRESS was held at Vienna. *American Political Science R.*, 4:429.

June, 1910.

- 1 FRANCE—MOROCCO. The Commission to deal with foreign claims against the Maghzen relating to engagements or events before June 30, 1909, begins its labors, under the special agreement as to procedure signed April 25, 1910. *Times*, May 16 and June 14. *See March 5.*
- 1 GREAT BRITAIN—UNITED STATES. Opening of the Tribunal at the Hague for the arbitration of the North Atlantic Fisheries Question. The decision was rendered September 7. *Times*, June 2, *et seq.*; *The Newfoundland Fisheries Dispute, Outlook*, 95:278; *Stead: The Fisheries Arbitration at the Hague, Independent*, 69:8; *McGrath: The Atlantic Fisheries Dispute, R. of Reviews*, 41:719; *The Fisheries Decision, Nation*, 91:233; *R. Generale de Dr. Int. Public*, 17:260. Text of award in this JOURNAL, p. 000. The cases submitted to the Hague Tribunal since its establishment in 1899 have been as follows: (1) Mexico-United States, 1902—The Pious Fund of the Californias; (2) France, Germany, and Great Britain v. Japan, 1902—The House Tax; (3) Germany, Great Britain, and Italy v. Venezuela, 1903—Preferential Claims; (4) France v. Great Britain, 1904—Mascat; (5) France v. Germany, 1909—Casablanca Affair; (6) Norway v. Sweden, 1909—Maritime Boundary; (7) United States v. Great Britain, 1910—North Atlantic Fisheries; and (8) now before the Tribunal, United States v. Venezuela—the

June, 1910.

Orinoco Steamship Company. NOTE: The Emery Case, Nicaragua v. United States, was referred to the Tribunal by a protocol signed May 25, 1909, but a final settlement was announced September 18, 1909.

- 1 SOUTH AFRICAN UNION goes into effect. *Times*, April 30, May 28 and 31. *Lord Gladstone and South Africa*, *Outlook*, 95:279.
- 2-5 INTERNATIONAL CONGRESS OF INDUSTRIAL PROPERTY. The Belgian National Association arranged the results of former congresses and will present this codification to the next congress to be held at Washington in 1911. *R. Economique Int.*, 7:II:203.
- 3 ATLANTIC CABLE from Ascension to Buenos Aires opened. Second longest in the world. *Times*, June 4.
- 6-9 SEVENTH INTERNATIONAL COTTON CONGRESS held at Brussels. *Times*, May 31, June 6, "Unification of Commercial Law"; June 9, Resolutions passed by the Congress.
- 6-16 INTERNATIONAL HORSE SHOW held at London. *Times*, June 7.
- 9 INTERNATIONAL. Deposit of ratifications of the Revised Convention of Berne, signed at Berlin, November 13, 1908, made by Germany, Belgium, Haiti, Japan, with reservations, Liberia, Luxemburg, Monaco, and Switzerland. June 30, by France and Tunis. *Droit d'auteur*, 23:85; *Reichs-G.*, No. 47, 1910.
- 9 ARGENTINE. A presidential decree drafting twenty Argentine officers into the United States Navy for a short period in accordance with an agreement with the American Government arising out of the battleship contract. *Times*, June 11.
- 10 SPAIN. Decree issued giving to Protestant congregations and schools the right to display on buildings signs or notices that services were being held within. *Tridon*, *The Meaning of the Spanish Crisis*, *Forum*, 44:272-279; *The Spanish Contention*, *Independent*, 69:495; *Ireland*, *The Vatican Incident*, same, 68:1015-10; *Outlook*, 94:776; *Spain and the Vatican*, *Times*, August 2; *Outlook*, 95:459; *Independent*, 68:1319; 69:313-314.
- 12 BELGIUM—FRANCE. Agreement takes effect (see March 5) providing that under the convention relative to the reparation of damages resulting from accidents of labor, concluded at Paris, February 21, 1906 (*q. v.*) proper notice of a pending inquest shall be given to the respective consular officers, etc. *Monit.*, April 8.

June, 1910.

- 14-24 THIRD WORLD'S MISSIONARY CONGRESS held at Edinburgh, *Times*, June 18; *Outlook*, 95:355, 459, and *Brown: The World's Missionary Congress at Edinburgh*, 95:558; *Stimson: The Great Conference in Edinburgh*, *Independent*, 69:16-20; *Fahs: The Edinburgh Conference*, *American R. of Reviews*, 42:187-9; *Bryan, The World Missionary Movement*, *Outlook*, 95:823-826. The first congress met in London; the second in New York.
- 16 MEXICO—RUSSIA. Proclamation by the President of the commercial convention signed at St. Petersburg October 2/September 19, 1909. Approved by Senate of Mexico, November 22, 1909; by the Emperor of Russia, April 16, 1910. Text in *Diario Oficial*, June 22, 1910.
- 21 GREAT BRITAIN—MONTENEGRO. Ratifications exchanged at Cetinje, of Convention of Commerce and Navigation signed at Cetinje, January 11, 1910. *Treaty ser.*, No. 19, 1910; Supplement to this JOURNAL, p. 314.
- 21-23 FOURTH INTERNATIONAL CONGRESS OF CHAMBERS OF COMMERCE AND INDUSTRIAL ORGANIZATION held at London. *Times*, June 6; *Mém. dipl.*, June 26; *Daily Consular and Trade Reports*, 13:849; *Monthly B. of the Chamber of Commerce of the State of New York*, June, 1910. Former congresses were held at Liege, 1905; Milan, 1906; and Prague, 1908. In 1912, in the United States.
- 22 ECUADOR—UNITED STATES. Ratifications exchanged at Washington of the Arbitration Convention signed at Washington, January 7, 1909. Proclaimed, June 23, 1910. *U. S. Treaty ser.*, No. 549; Supplement to this JOURNAL, p. 347.
- 23 INTERNATIONAL CONFERENCE FOR THE UNIFICATION OF THE LAW RELATING TO BILLS OF EXCHANGE met at The Hague. *Times*, June 24; *Mém. dipl.*, June 26, July 10.
- 25 UNITED STATES. Joint resolution approved authorizing the appointment of a commission in relation to universal peace. *Stats. of U. S. Second Session of Sixty-first Congress*, Supplement to this JOURNAL, p. 347, *An American Peace Commission*, *Independent*, 68:1455-6; *Problems before the Peace Commission*, *do*, 69:93-94; *Holt: The United States Peace Commission*, *North American R.*, 192; 301-316.

June, 1910.

- 27 BELGIUM—NETHERLANDS. The commission for the study of economic questions met at Brussels. *Mém. dipl.*, July 3. This is the third conference.
- 27-30 ZIONIST CONFERENCE met at Berlin. This meeting took the place of an international congress this year. *Times*, July 4.
- 28 CANADA—UNITED STATES. International Waterways Commission met in Toronto, to take up question of the entire water boundary. *R. of Reviews*, 42:154.

July, 1910.

- 1 JAPAN. Port Arthur (Dairen) opened to shipping of all nations. *Times*, July 2; *Mém. dipl.*, July 31-August 7.
- 1 JAPAN—MEXICO. Convention for the direct exchange of money-orders between the two countries signed at Mexico, February 28, 1910, and at Tokyo, on the 11th day of the 4th month of the 43d year of Meiji, takes effect. Approved by Mexican Senate, May 16, and ratified by the President, June 9. Text in *Diario oficial*, June 25; *L'Union Postale*, 35:144.
- 1 HUNGARY—UNITED STATES. Parcel-Post Convention between the respective Postal Administrations signed at Budapest, May 15, 1910, and at Washington, June 27, 1910, goes into effect. *Daily Consular and Trade Reports*, August 31.
- 1 BELGIUM. Kongo reforms go into effect. They include: (1) reduction of taxes, collected in money and not paid by labor; (2) native officials instead of white; (3) restriction of obligatory labor to works for the improvement of their own conditions; and (4) suppression of polygamy. *R. of Reviews*, 41:540; *Independent*, 68:839; *Le Congo Belge*, *R. des Deux Mondes*, 58:807-845; *Morel: Belgium, Britain and the Congo, Nineteenth Century*, 167:407-425.
- 4 JAPAN—RUSSIA. Convention signed at St. Petersburg regarding the railroad situation in Manchuria. *Times*, July 6, text, July 13; *The Far Eastern R.*, 7:38; *The Russo-Japanese Convention*, *J. American Asiatic Association*, 10:204; *New York Tribune*, July 6; *North China Herald*, 96:65 and 117; *American R. of Reviews*, 42:158-159; *Russia and Japan in Manchuria*, *Nation*, 91:26; *Zumoto, Japan in Manchuria*, *Independent*, 68:846-851. *Mém. dipl.*, July 10, 17-24, text; SUPPLEMENT, p. 279.

July, 1910.

- 4 INTERNATIONAL RAILWAY CONGRESS opened at Berne. *Mém. dipl.*, July 10; *Times*, (Supplement) July 6.
- 4-8 INTERNATIONAL SWEDENBORG CONGRESS met at London. *Times*, July 5-9.
- 6 INTERNATIONAL AGRICULTURAL EXHIBITION opened at Buenos Aires. *Times*, July 8.
- 8 CRETE. The Consuls of the four protecting powers, France, Great Britain, Italy, and Russia, handed the Cretan Government an ultimatum as to the seating of the Mussulman delegates without requiring them to take the oath. On July 11 the Cretan Government officially announced its submission to the conditions laid down by the powers. *Times*, July 11, 12; *Contemporary R.*, 535: 119-128; *La question cretoise, Q. dipl.*, 14:186; "*En Crete*," *La R. de Paris*, 17:419-448.
- 10-August 25 FOURTH PAN-AMERICAN CONFERENCE held at Buenos Aires. *B. A. R.*, August and September; *Outlook*, 95:329; *De Lavalle*: "*El Programa de la Cuarta Conferencia Internacional Americana*," *R. Americana*, 1:182-212. First Conference, Washington, 1889; second, Mexico, 1901; third, Rio de Janeiro, 1906.
- 11 GREAT BRITAIN-NETHERLANDS. Ratifications exchanged at London, of convention signed at London, December 16, 1909, renewing for five years the Arbitration convention of February 15, 1905. *Treaty ser.*, No. 20, 1910. See *Treaty ser.*, No. 19, 1905.
- 12 FRANCE. Circular issued relative to the delivery of international route certificates according to the terms of the convention relative to the circulation of automobiles, signed at Paris, October 11, 1909. *J. O.*, July 21.
- 13 FRANCE-SWITZERLAND. Exchange of notes regarding the renewal for two years of the arbitration convention concluded December 14, 1904. *J. O.*, July 24.
- 17 JAPAN. Notification of termination of Japan's commercial treaties have been sent to all European countries with which she has such agreements. *Times*, July 19.
- 18-22 SEVENTH INTERNATIONAL CONGRESS OF EDITORS held at Amsterdam. *Droit D'auteur*, 23:44, 103-110. Previous congresses have met at (1) Paris, 1896; (2) Brussels, 1897; (3) London, 1899; (4) Leipzig, 1901; (5) Milan, 1906; and (6) Madrid, 1908. *Publishers Weekly*, August 13.

July, 1910.

- 19 INTERNATIONAL CONGRESS OF STUDENTS opened at Bogota.
- 21 FRANCE. Decree and regulations issued relative to the creation of an office of foreign legislation and of international law. Text and also the names of the members of the *comité* in *J. O.*, July 27; *Mém. dipl.*, July 31–August 7.
- 24–26 SECOND INTERNATIONAL CONGRESS OF THE PERIODICAL PRESS met at Brussels. *R. Economique Int.*, 7:II:398.
- 26 FRANCE—NETHERLANDS. Decree issued approving the convention signed at Paris, December 29, 1909, proroguing the arbitration convention signed at Paris, April 6, 1904. Ratifications were exchanged at Paris, July 5, 1910. *J. O.*, July 31.
- 27 AUSTRIA—SERVIA. A treaty of commerce was signed at Belgrade. *Mém. dipl.*, July 31–August 7.
- 27–31 INTERNATIONAL CONGRESS ON ADMINISTRATIVE SCIENCES met at Brussels. *R. Economique Int.*, 7:II:399.

OTIS G. STANTON.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

UNITED STATES ¹

Canal Zone, Isthmus of Panama, Executive order concerning civil action in courts of Canal Zone in cases in which parties are alien non-residents or citizens of the United States transiently in Canal Zone. No. 1231. 1 p. July 28, 1910.

Chinese indemnity, Report on proposed amendment to joint resolution for remission of portion of. June 2, 1910. 1 p. *H. of R. Comm. on For. Rel.* (H. rp. 1611.)

Consular service, Information regarding appointments and promotions in. 1910. 21 p. *Dept. of State.* (Appointments Bureau.)

Copyright, Proclamation of President extending benefits of, to subjects of Luxemburg. No. 1056. June 29, 1910. 1 p.

Diplomatic and consular service of the United States; corrected to July 5, 1910. 46 p. *Dept. of State.*

Diplomatic service, Information regarding appointments and promotions in. 1910. 13 p. *Dept. of State.* (Appointments Bureau.)

Ecuador, Arbitration convention between United States and. Signed at Washington, January 7, 1909; proclaimed June 23, 1910. 5 p. [English and Spanish.] *Dept. of State.* (Treaty series No. 549.)

Foreign Relations, Papers relating to, with annual message of the President. 1910. 2 pts. Cloth, each pt. 65c.

———. (H. doc. 1, 60th Cong. 1st sess.)

Fur-bearing animals, Regulations for protection of, in Alaska. June, 1910. 1 p. *Dept. of Commerce and Labor, Circular No. 206.* (Bureau of Fisheries.)

Immigrants, Information for. 1909. [Reprint 1910, with slight changes.] 26 p. *Bureau of Immigration and Naturalization.*

Immigration and naturalization laws. Hearings, January 20–May 21, 1910. 522 p. *H. of R. Comm. on Immigration and Naturalization.*

Immigration laws and regulations of July 1, 1907. 9th ed. July 12, 1910. 93 p. *Bureau of Immigration and Naturalization.* Paper, 10c.

¹ When prices are given, the documents in question may be obtained for the amount noted from the Superintendent of Documents, Government Printing Office, Washington, D. C.

Immigration situation in Canada. April 1, 1910. 218 p. *Immigration Commission*. (S. doc. 469.)

International classification of causes of sickness and death. Revised by International Commission at Paris, July 1-3, 1909. [Revised ed.] 1910. 146 p. Paper, 25c.

International Congress of Refrigeration, Report on resolution to invite the Third, to hold its meetings in the United States. June 16, 1910. 3 p. *H. of R. Comm. on Foreign Affairs*. (H. rp. 1610.) Paper, 5c.

International Waterways Commission under treaty of June 11, 1909, Report relating to. June 16, 1910. 1 p. *H. of R. Comm. on Foreign Affairs*. (H. rp. 1433.)

Naturalization. Report submitting bill to relieve persons entitled to naturalization prior to May 1, 1910, who by reason of misinformation or excusable mistake have neglected to take proper steps to obtain their citizenship. June 14, 1910. 1 p. *Senate Immigration Committee*. (S. rp. 843.)

Naturalization laws and regulations. July 1, 1910. 26 p. *Bureau of Immigration and Naturalization*.

Opium. Estimate of deficiency in appropriation to enable Government to stamp out opium evil. June 10, 1910. 2 p. (H. doc. 954.)

Panama Exposition. Hearings, May 12, 26, 1910. 61 p., il. *H. of R. Comm. on Foreign Affairs*.

———. Report of Committee, June 15, 1910. 1 p. (H. rp. 1609.)

———. Hearings, May 27, 1910. 48 p., il. *Senate Select Comm. on Industrial Expositions*.

Parcels post convention between postal administrations of United States and Hungary. Signed at Budapest, May 15, 1910; Washington, June 27, 1910; approved June 30, 1910. 7 p. *Post-office Dept.*

Passamaquoddy Bay, Treaty between United States and Great Britain delimiting boundary in. Signed at Washington, May 21, 1910; ratified by the President, July 13, 1910; proclaimed September 3, 1910. *Dept. of State*. (Treaty series No. 551.)

Peace, universal. Report on appointment of commission in relation to. June 4, 1910. 5 p. *H. of R. Comm. on Foreign Affairs*. (H. rp. 1440.) Paper, 5c.

Peace, International federation for maintenance of. Hearing, May 7, 1910. *H. of R. Comm. on Foreign Affairs*.

Red Cross, American National. Report on bill to amend incorporating act. June 15, 1910. 1 p. *H. of R. Comm. on Foreign Affairs*. (H. rp. 1592.)

Student interpreter corps of United States in China, Japan and Turkey, Information regarding appointments and promotions in. 1910. 15 p. *Dept of State*. (Appointments Bureau.)

Tariff negotiations between the United States and foreign governments made necessary by Tariff Act of August 5, 1909, Reports relative to. June 9, 1910. 155 p. *Dept. of State*. (H. doc. 956.)

Treaties, conventions, international acts, protocols, and agreements between the United States and other Powers, 1776-1909. 1910. 2 v. *Senate Comm. on Foreign Affairs*. (S. doc. 357.) Cloth, \$1.25 per vol. per vol.

White slave traffic. Report on act to further regulate interstate and foreign commerce by prohibiting transportation therein for immoral purposes of women and girls; with views of minority. June 21, 1910. 32 p. *Senate Immigration Committee*. (S. rp. 886.) Paper, 5c.

GREAT BRITAIN ²

Accessions to and withdrawals from various treaty engagements between the United Kingdom and foreign Powers. 1910. *Foreign Office*. (Cd. 5026; Treaty series No. 5, 1910.) $\frac{1}{2}$ d.

Accessions, etc., of foreign states to various international treaty engagements. 1910. *Foreign Office*. (Cd. 5027; Treaty series No. 6, 1910.) $\frac{1}{2}$ d.

Aliens Act, 1905. Return of alien passenger traffic between the United Kingdom and ports in Europe or within the Mediterranean Sea, and number of expulsion orders made, during the three months ended Dec. 31, 1909. (Cd. 5043.) $1\frac{1}{2}$ d.

———. Three months ended March 1, 1910. (Cd. 5153.) $1\frac{1}{2}$ d.

———. Fourth annual report of H. M. Inspector and statement with regard to expulsion of aliens, for 1909. (Cd. 5261.) 7d.

Egypt. Reports of H. M. Agent and Consul-General on the finances, administration and condition of Egypt and the Soudan in 1909. (Cd. 5121.) $8\frac{1}{2}$ d.

Emigration. Report on the Emigrants' Information Office. 1909. With appendix. (Cd. 5101.) $2\frac{1}{2}$ d.

Emigration from India to the Crown Colonies and Protectorates, Report of Committee on. (Cd. 5192.) $11\frac{1}{2}$ d.

² Official publications of Great Britain, India and many of the British colonies may be purchased of P. S. King & Son, Orchard House, 2 and 4 Great Smith Street, Westminster, London, England.

Emigration statistics of Ireland. Report and tables for 1909. (Cd. 5088.) 2d.

French customs tariff, Translation of, as amended by the law of March 29, 1910, showing former rates of duty. (Cd. 5127.) 11½d.

Imperial Conference [November, 1907, to April, 1910], Further correspondence relating to. (Cd. 5273.) 2s.

Imperial copyright conference 1910. Memorandum of proceedings. (Cd. 5272.) 1d.

International convention concerning the laws and customs of war on land. Signed at The Hague, Oct. 18, 1907. *Foreign Office*. (Cd. 5030; Treaty series No. 9, 1910.) 2½d.

International convention for the creation of an international agricultural institute. Signed at Rome, June 7, 1905. *Foreign Office*. (Cd. 5124; Treaty series No. 17, 1910.) 1d.

International convention relative to certain restrictions on the exercise of the right of capture in maritime war. Signed at The Hague, Oct. 18, 1907. *Foreign Office*. (Cd. 5118; Treaty series No. 14, 1910.) 1½d.

International convention relative to the conversion of merchant ships into warships. Signed at The Hague, Oct. 18, 1907. *Foreign Office*. (Cd. 5115; Treaty series No. 11, 1910.) 1½d.

International convention relative to the laying of automatic submarine contact mines. Signed at The Hague, Oct. 18, 1907. *Foreign Office*. (Cd. 5116; Treaty series No. 12, 1910.) 1½d.

International convention relative to the opening of hostilities. Signed at The Hague, Oct. 18, 1907. *Foreign Office*. (Cd. 5029; Treaty series No. 8, 1910.) 1½d.

International convention relative to the status of enemy merchant ships at the outbreak of hostilities. Signed at The Hague, Oct. 18, 1907. *Foreign Office*. (Cd. 5031; Treaty series No. 10, 1910.) 1½d.

International convention respecting bombardments by naval forces in time of war. Signed at The Hague, Oct. 18, 1907. *Foreign Office*. (Cd. 5117; Treaty series No. 13, 1910.) 2d.

International convention respecting the limitation of the employment of force for the recovery of contract debts. Signed at The Hague, Oct. 18, 1907. *Foreign Office*. (Cd. 5028; Treaty series No. 7, 1910.) 1½d.

International convention with respect to the international circulation of motor vehicles. Signed at Paris, Oct. 11, 1909. *Foreign Office*. (Cd. 5125; Treaty series No. 18, 1910.) 1½d.

International declaration prohibiting the discharge of projectiles and

explosives from balloons. Signed at The Hague, Oct. 18, 1907. *Foreign Office.* (Cd. 5119; Treaty series No. 15, 1910.) $\frac{1}{2}$ d.

Japan. Proposed new customs tariff, showing present rates of duty. (Cd. 5150.) 6d.

Malta, Further correspondence relating to political conditions of. [April, 1904, to December, 1909.] (Cd. 5216.) 8d.

Montenegro, Convention of commerce and navigation between, and the United Kingdom. Signed at Cetinje, Jan. 11, 1910. *Foreign Office.* (Cd. 5126; Treaty series No. 19, 1910.) $\frac{1}{2}$ d.

Netherlands, Convention between the United Kingdom and, renewing for five years the arbitration convention of Feb. 15, 1905. Signed at London, Dec. 16, 1909. *Foreign Office.* (Cd. 5220; Treaty series No. 20, 1910.) $\frac{1}{2}$ d.

Norway and Sweden. Declaration between the United Kingdom, France and Norway, and between the United Kingdom, France and Sweden, concerning the abrogation of the Treaty of Nov. 21, 1855, relative to the integrity of Norway and Sweden. Signed at Christiania, Nov. 2, 1907, and at Stockholm, April 23, 1908. *Foreign Office.* (Cd. 5123; Treaty series No. 16, 1910.) $\frac{1}{2}$ d.

Persia, Further correspondence respecting the affairs of. [May to November, 1909.] 1910. (Cd. 5120.) 5d.

Somaliland, Further correspondence relating to affairs in. [March and April, 1910.] (Cd. 5132.) $1\frac{1}{2}$ d.

Tibet, Further papers relating to. [September, 1904, to May, 1910.] (Cd. 5240.) 2d.

GEORGE A. FINCH.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

UNITED STATES VERSUS GREAT BRITAIN

IN THE MATTER OF THE NORTH ATLANTIC COAST FISHERIES

The Permanent Court of Arbitration at The Hague

PREAMBLE

Whereas a Special Agreement between the United States of America and Great Britain, signed at Washington the 27th January, 1909, and confirmed by interchange of Notes dated the 4th March, 1909, was concluded in conformity with the provisions of the General Arbitration Treaty between the United States of America and Great Britain, signed the 4th April, 1908, and ratified the 4th June, 1908;

And whereas the said Special Agreement for the submission of questions relating to fisheries on the North Atlantic Coast under the general treaty of arbitration concluded between the United States and Great Britain on the 4th day of April, 1908, is as follows:

Article I.

Whereas by Article I of the Convention signed at London on the 20th day of October, 1818, between Great Britain and the United States, it was agreed as follows:—

Whereas differences have arisen respecting the liberty claimed by the United States for the Inhabitants thereof, to take, dry and cure Fish on Certain Coasts, Bays, Harbours and Creeks of His Britannic Majesty's Dominions in America, it is agreed between the High Contracting Parties, that the Inhabitants of the said United States shall have forever, in common with the Subjects of His Britannic Majesty, the Liberty to take Fish of every kind on that part of the Southern Coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the Western and Northern Coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the Coasts, Bays, Harbours, and Creeks from Mount Joly on the Southern Coast of Labrador, to and through the Straits of Belleisle and thence Northwardly indefinitely along the Coast, without prejudice, however, to any of the exclusive Rights of the Hudson Bay Company; and that the American Fishermen shall also have liberty forever, to dry and cure Fish in any of the unsettled Bays, Harbours and Creeks of the Southern part of the Coast of Newfoundland here-

above described, and of the Coast of Labrador; but so soon as the same, or any Portion thereof, shall be settled, it shall not be lawful for the said Fishermen to dry or cure Fish at such Portion so settled, without previous agreement for such purpose with the Inhabitants, Proprietors, or Possessors of the ground.— And the United States hereby renounce forever, any Liberty heretofore enjoyed or claimed by the Inhabitants thereof, to take, dry, or cure Fish on, or within three marine Miles of any of the Coasts, Bays, Creeks, or Harbours of His Britannic Majesty's Dominions in America not included within the above-mentioned limits; provided, however, that the American Fishermen shall be admitted to enter such Bays or Harbours for the purpose of Shelter and of repairing Damages therein, of purchasing Wood, and of obtaining Water, and for no other purpose whatever. But they shall be under such Restrictions as may be necessary to prevent their taking, drying or curing Fish therein, or in any other manner whatever abusing the Privileges hereby reserved to them.

And, whereas, differences have arisen as to the scope and meaning of the said Article, and of the liberties therein referred to, and otherwise in respect of the rights and liberties which the inhabitants of the United States have or claim to have in the waters or on the shores therein referred to:

It is agreed that the following questions shall be submitted for decision to a tribunal of arbitration constituted as hereinafter provided:—

Question 1. To what extent are the following contentions or either of them justified?

It is contended on the part of Great Britain that the exercise of the liberty to take fish referred to in the said Article, which the inhabitants of the United States have forever in common with the subjects of His Britannic Majesty, is subject, without the consent of the United States, to reasonable regulation by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or rules, as, for example, to regulations in respect of (1) the hours, days, or seasons when fish may be taken on the treaty coasts; (2) the method, means, and implements to be used in the taking of fish or in the carrying on of fishing operations on such coasts; (3) any other matters of a similar character relating to fishing; such regulations being reasonable, as being, for instance—

(a.) Appropriate or necessary for the protection and preservation of such fisheries and the exercise of the rights of British subjects therein and of the liberty which by the said Article I the inhabitants of the United States have therein in common with British subjects;

(b.) Desirable on grounds of public order and morals;

(c.) Equitable and fair as between local fishermen and the inhabitants of the United States exercising the said treaty liberty and not so framed as to give unfairly an advantage to the former over the latter class.

It is contended on the part of the United States that the exercise of such liberty is not subject to limitations or restraints by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or regulations in respect of (1) the hours, days, or seasons when the inhabitants of the United States may take fish on the treaty coasts, or (2) the method, means, and implements used by them in taking fish or in carrying on fishing operations on such coasts, or (3) any other limitations or restraints of similar character—

(a.) Unless they are appropriate and necessary for the protection and preservation of the common rights in such fisheries and the exercise thereof; and

(b.) Unless they are reasonable in themselves and fair as between local fishermen and fishermen coming from the United States, and not so framed as to give an advantage to the former over the latter class; and

(c.) Unless their appropriateness, necessity, reasonableness, and fairness be determined by the United States and Great Britain by common accord and the United States concurs in their enforcement.

Question 2. Have the inhabitants of the United States, while exercising the liberties referred to in said Article, a right to employ as members of the fishing crews of their vessels persons not inhabitants of the United States?

Question 3. Can the exercise by the inhabitants of the United States of the liberties referred to in the said Article be subjected, without the consent of the United States, to the requirements of entry or report at custom-houses or the payment of light or harbour or other dues, or to any other similar requirement or condition or exaction?

Question 4. Under the provision of the said Article that the American fishermen shall be admitted to enter certain bays or harbours for shelter, repairs, wood, or water, and for no other purpose whatever, but that they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein or in any other manner whatever abusing the privileges thereby reserved to them, is it permissible to impose restrictions making the exercise of such privileges conditional upon the payment of light or harbour or other dues, or entering or reporting at custom-houses or any similar conditions?

Question 5. From where must be measured the "three marine miles of any of the coasts, bays, creeks, or harbours" referred to in the said Article?

Question 6. Have the inhabitants of the United States the liberty under the said Article or otherwise to take fish in the bays, harbours, and creeks on that part of the southern coast of Newfoundland which extends from Cape Ray to Rameau Islands, or on the western and northern coasts of Newfoundland from Cape Ray to Quirpon Islands, or on the Magdalen Islands?

Question 7. Are the inhabitants of the United States whose vessels resort to the treaty coasts for the purpose of exercising the liberties referred to in Article I of the treaty of 1818 entitled to have for those vessels, when duly authorized by the United States in that behalf, the commercial privileges on the treaty coasts accorded by agreement or otherwise to United States trading vessels generally?

Article II.

Either Party may call the attention of the Tribunal to any legislative or executive act of the other Party, specified within three months of the exchange of notes enforcing this agreement, and which is claimed to be inconsistent with the true interpretation of the Treaty of 1818; and may call upon the Tribunal to express in its award its opinion upon such acts, and to point out in what respects, if any, they are inconsistent with the principles laid down in the award in reply to the preceding questions; and each Party agrees to conform to such opinion.

Article III.

If any question arises in the arbitration regarding the reasonableness of any regulation or otherwise which requires an examination of the practical effect of any provisions in relation to the conditions surrounding the exercise of the liberty of fishery enjoyed by the inhabitants of the United States, or which requires expert information about the fisheries themselves, the Tribunal may, in that case, refer such question to a Commission of three expert specialists in such matters; one to be designated by each of the Parties hereto, and the third, who shall not be a national of either Party, to be designated by the Tribunal. This Commission shall examine into and report their conclusions on any question or questions so referred to it by the Tribunal and such report shall be considered by the Tribunal and shall, if incorporated by them in the award, be accepted as a part thereof.

Pending the report of the Commission upon the question or questions so referred and without awaiting such report, the Tribunal may make a separate award upon all or any other questions before it, and such separate award, if made, shall become immediately effective, provided that the report aforesaid shall not be incorporated in the award until it has been considered by the Tribunal. The expenses of such Commission shall be borne in equal moieties by the Parties hereto.

Article IV.

The Tribunal shall recommend for the consideration of the High Contracting Parties rules and a method of procedure under which all questions which may arise in the future regarding the exercise of the liberties above referred to may be determined in accordance with the principles laid down in the award. If the High Contracting Parties shall not adopt the rules and method of procedure so recommended, or if they shall not, subsequently to the delivery of the award, agree upon such rules and methods, then any differences which may arise in the future between the High Contracting Parties relating to the interpretation of the Treaty of 1818, or to the effect and application of the award of the Tribunal shall be referred informally to the Permanent Court at The Hague for decision by the summary procedure provided in Chapter IV of The Hague Convention of the 18th October, 1907.

Article V.

The Tribunal of Arbitration provided for herein shall be chosen from the general list of members of the Permanent Court at The Hague, in accordance with the provisions of Article XLV of the Convention for the Settlement of International Disputes, concluded at the Second Peace Conference at The Hague on the 18th of October, 1907. The provisions of said Convention, so far as applicable and not inconsistent herewith, and excepting Articles LIII and LIV, shall govern the proceedings under the submission herein provided for.

The time allowed for the direct agreement of His Britannic Majesty and the President of the United States on the composition of such Tribunal shall be three months.

Article VI.

The pleadings shall be communicated in the order and within the time following:—

As soon as may be and within a period not exceeding seven months from the date of the exchange of notes making this agreement binding the printed case of each of the Parties hereto, accompanied by printed copies of the documents, the official correspondence, and all other evidence on which each Party relies, shall be delivered in duplicate (with such additional copies as may be agreed upon) to the agent of the other Party. It shall be sufficient for this purpose if such case is delivered at the British Embassy at Washington or at the American Embassy at London, as the case may be, for transmission to the agent for its Government.

Within fifteen days thereafter such printed case and accompanying evidence of each of the Parties shall be delivered in duplicate to each member of the Tribunal, and such delivery may be made by depositing within the stated period the necessary number of copies with the International Bureau at The Hague for transmission to the Arbitrators.

After the delivery on both sides of such printed case, either Party may, in like manner, and within four months after the expiration of the period above fixed for the delivery to the agents of the case, deliver to the agent of the other Party (with such additional copies as may be agreed upon), a printed counter-case accompanied by printed copies of additional documents, correspondence, and other evidence in reply to the case, documents, correspondence, and other evidence so presented by the other Party, and within fifteen days thereafter such Party shall, in like manner as above provided, deliver in duplicate such counter-case and accompanying evidence to each of the Arbitrators.

The foregoing provisions shall not prevent the Tribunal from permitting either Party to rely at the hearing upon documentary or other evidence which is shown to have become open to its investigation or examination or available for use too late to be submitted within the period hereinabove fixed for the delivery of copies of evidence, but in case any such evidence is to be presented, printed copies of it, as soon as possible after it is secured, must be delivered, in like manner as provided for the delivery of copies of other evidence, to each of the Arbitrators and to the agent of the other Party. The admission of any such additional evidence, however, shall be subject to such conditions as the Tribunal may impose, and the other Party shall have a reasonable opportunity to offer additional evidence in rebuttal.

The Tribunal shall take into consideration all evidence which is offered by either Party.

Article VII.

If in the case or counter-case (exclusive of the accompanying evidence) either Party shall have specified or referred to any documents, correspondence, or other evidence in its own exclusive possession without annexing a copy, such Party shall be bound, if the other Party shall demand it within thirty days after the delivery of the case or counter-case respectively, to furnish to the Party applying for it a copy thereof; and either Party may, within the like

time, demand that the other shall furnish certified copies or produce for inspection the originals of any documentary evidence adduced by the Party upon whom the demand is made. It shall be the duty of the Party upon whom any such demand is made to comply with it as soon as may be, and within a period not exceeding fifteen days after the demand has been received. The production for inspection or the furnishing to the other Party of official governmental publications, publishing, as authentic, copies of the documentary evidence referred to, shall be a sufficient compliance with such demand, if such governmental publications shall have been published prior to the 1st day of January, 1908. If the demand is not complied with, the reasons for the failure to comply must be stated to the Tribunal.

Article VIII.

The Tribunal shall meet within six months after the expiration of the period above fixed for the delivery to the agents of the case, and upon the assembling of the Tribunal at its first session each Party, through its agent or counsel, shall deliver in duplicate to each of the Arbitrators and to the agent and counsel of the other Party (with such additional copies as may be agreed upon) a printed argument showing the points and referring to the evidence upon which it relies.

The time fixed by this Agreement for the delivery of the case, counter-case, or argument, and for the meeting of the Tribunal, may be extended by mutual consent of the Parties.

Article IX.

The decision of the Tribunal shall, if possible, be made within two months from the close of the arguments on both sides, unless on the request of the Tribunal the Parties shall agree to extend the period.

It shall be made in writing, and dated and signed by each member of the Tribunal, and shall be accompanied by a statement of reasons.

A member who may dissent from the decision may record his dissent when signing.

The language to be used throughout the proceedings shall be English.

Article X.

Each Party reserves to itself the right to demand a revision of the award. Such demand shall contain a statement of the grounds on which it is made and shall be made within five days of the promulgation of the award, and shall be heard by the Tribunal within ten days thereafter. The Party making the demand shall serve a copy of the same on the opposite Party, and both Parties shall be heard in argument by the Tribunal on said demand. The demand can only be made on the discovery of some new fact or circumstance calculated to exercise a decisive influence upon the award and which was unknown to the Tribunal and to the Party demanding the revision at the time the discussion was closed, or upon the ground that the said award does not fully and sufficiently, within the meaning of this Agreement, determine any question or questions submitted. If the Tribunal shall allow the demand for a revision, it shall afford such opportunity for further hearings and arguments as it shall deem necessary.

Article XI.

The present Agreement shall be deemed to be binding only when confirmed by the two Governments by an exchange of notes.

In witness whereof this Agreement has been signed and sealed by His Britannic Majesty's Ambassador at Washington, the Right Honourable JAMES BRYCE, O.M., on behalf of Great Britain, and by the Secretary of State of the United States, ELIHU ROOT, on behalf of the United States.

Done at Washington on the 27th day of January, one thousand nine hundred and nine.

JAMES BRYCE. [seal.]

ELIHU ROOT. [seal.]

And whereas, the parties to the said Agreement have by common accord, in accordance with Article V, constituted as a Tribunal of Arbitration the following Members of the Permanent Court at The Hague: Mr. H. LAMMASCH, Doctor of Law, Professor of the University of Vienna, Aulic Councillor, Member of the Upper House of the Austrian Parliament; His Excellency Jonkheer A. F. DE SAVORNIN LOHMAN, Doctor of Law, Minister of State, Former Minister of the Interior, Member of the Second Chamber of the Netherlands; the Honourable GEORGE GRAY, Doctor of Laws, Judge of the United States Circuit Court of Appeals, former United States Senator; the Right Honourable Sir CHARLES FITZPATRICK, Member of the Privy Council, Doctor of Laws, Chief Justice of Canada; the Honourable LUIS MARIA DRAGO, Doctor of Law, former Minister of Foreign Affairs of the Argentine Republic, Member of the Law Academy of Buenos-Aires;

And whereas, the Agents of the Parties to the said Agreement have duly and in accordance with the terms of the Agreement communicated to this Tribunal their cases, counter-cases, printed arguments and other documents;

And whereas, counsel for the Parties have fully presented to this Tribunal their oral arguments in the sittings held between the first assembling of the Tribunal on 1st June, 1910, to the close of the hearings on 12th August, 1910;

Now, therefore, this Tribunal having carefully considered the said Agreement, cases, counter-cases, printed and oral arguments, and the documents presented by either side, after due deliberation makes the following decisions and awards:

QUESTION I.

To what extent are the following contentions or either of them justified?

It is contended on the part of Great Britain that the exercise of the liberty to take fish referred to in the said Article, which the inhabitants of the United

States have forever in common with the subjects of His Britannic Majesty, is subject, without the consent of the United States, to reasonable regulation by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or rules, as, for example, to regulations in respect of (1) the hours, days, or seasons when fish may be taken on the treaty coasts; (2) the method, means, and implements to be used in the taking of fish or in the carrying on of fishing operations on such coasts; (3) any other matters of a similar character relating to fishing; such regulations being reasonable, as being, for instance —

(a) Appropriate or necessary for the protection and preservation of such fisheries and the exercise of the rights of British subjects therein and of the liberty which by the said Article I the inhabitants of the United States have therein in common with British subjects;

(b) Desirable on grounds of public order and morals;

(c) Equitable and fair as between local fishermen and the inhabitants of the United States exercising the said treaty liberty, and not so framed as to give unfairly an advantage to the former over the latter class.

It is contended on the part of the United States that the exercise of such liberty is not subject to limitations or restraints by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or regulations in respect of (1) the hours, days, or seasons when the inhabitants of the United States may take fish on the treaty coasts, or (2) the method, means, and implements used by them in taking fish or in carrying on fishing operations on such coasts, or (3) any other limitations or restraints of similar character —

(a) Unless they are appropriate and necessary for the protection and preservation of the common rights in such fisheries and the exercise thereof; and

(b) Unless they are reasonable in themselves and fair as between local fishermen and fishermen coming from the United States, and not so framed as to give an advantage to the former over the latter class; and

(c) Unless their appropriateness, necessity, reasonableness, and fairness be determined by the United States and Great Britain by common accord and the United States concurs in their enforcement.

Question I, thus submitted to the Tribunal, resolves itself into two main contentions:

1st. Whether the right of regulating reasonably the liberties conferred by the Treaty of 1818 resides in Great Britain;

2nd. And, if such right does so exist, whether such reasonable exercise of the right is permitted to Great Britain without the accord and concurrence of the United States.

The Treaty of 1818 contains no explicit disposition in regard to the right of regulation, reasonable or otherwise; it neither reserves that the right in express terms, nor refers to it in any way. It is therefore incumbent on this Tribunal to answer the two questions above indicated by interpreting the general terms of Article I of the treaty, and more

especially the words "the inhabitants of the United States shall have, for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind." This interpretation must be conformable to the general import of the instrument, the general intention of the parties to it, the subject matter of the contract, the expressions actually used and the evidence submitted.

Now in regard to the preliminary question as to whether the right of reasonable regulation resides in Great Britain:

Considering that the right to regulate the liberties conferred by the Treaty of 1818 is an attribute of sovereignty, and as such must be held to reside in the territorial sovereign, unless the contrary be provided; and considering that one of the essential elements of sovereignty is that it is to be exercised within territorial limits, and that, failing proof to the contrary, the territory is coterminous with the sovereignty, it follows that the burden of the assertion involved in the contention of the United States (viz. that the right to regulate does not reside independently in Great Britain, the territorial sovereign) must fall on the United States. And for the purpose of sustaining this burden, the United States have put forward the following series of propositions, each one of which must be singly considered.

It is contended by the United States:

- (1) That the French right of fishery under the Treaty of 1763 designated also as a liberty, was never subjected to regulation by Great Britain, and therefore the inference is warranted that the American liberties of fishery are similarly exempted.

The Tribunal is unable to agree with this contention:

(a) Because although the French right designated in 1713 merely "an allowance," (a term of even less force than that used in regard to the American fishery) was nevertheless converted, in practice, into an exclusive right, this concession on the part of Great Britain was presumably made because France, before 1713, claimed to be the sovereign of Newfoundland, and, in ceding the Island, had, as the American argument says, "reserved for the benefit of its subjects the right to fish and to use the strand;"

(b) Because the distinction between the French and American right is indicated by the different wording of the statutes for the observance of treaty obligations towards France and the United States, and by the British Declaration of 1783;

(c) And, also, because this distinction is maintained in the Treaty with France of 1904, concluded at a date when the American claim was approaching its present stage, and by which certain common rights of regulation are recognized to France.

For the further purpose of such proof it is contended by the United States:

- (2) That the liberties of fishery, being accorded to the inhabitants of the United States "for ever," acquire, by being in perpetuity and unilateral, a character exempting them from local legislation.

The Tribunal is unable to agree with this contention:

(a) Because there is no necessary connection between the duration of a grant and its essential status in its relation to local regulation; a right granted in perpetuity may yet be subject to regulation, or, granted temporarily, may yet be exempted therefrom; or being reciprocal may yet be unregulated, or being unilateral may yet be regulated: as is evidenced by the claim of the United States that the liberties of fishery accorded by the Reciprocity Treaty of 1854 and the Treaty of 1871 were exempt from regulation, though they were neither permanent nor unilateral;

(b) Because no peculiar character need be claimed for these liberties in order to secure their enjoyment in perpetuity, as is evidenced by the American negotiators in 1818 asking for the insertion of the words "for ever." International law in its modern development recognizes that a great number of treaty obligations are not annulled by war, but at most suspended by it;

(c) Because the liberty to dry and cure is, pursuant to the terms of the treaty, provisional and not permanent, and is nevertheless, in respect the liability to regulation, identical in its nature with, and never distinguished from, the liberty to fish.

For the further purpose of such proof, the United States allege:

- (3) That the liberties of fishery granted to the United States constitute an international servitude in their favour over the territory of Great Britain, thereby involving a derogation from the sovereignty of Great Britain, the servient State, and that therefore Great Britain is deprived, by reason of the grant, of its independent right to regulate the fishery.

The Tribunal is unable to agree with this contention:

(a) Because there is no evidence that the doctrine of international servitudes was one with which either American or British statesmen were conversant in 1818, no English publicists employing the term before 1818, and the mention of it in Mr. GALLATIN's report being insufficient;

(b) Because a servitude in the French law, referred to by Mr. GALLATIN, can, since the Code, be only real and cannot be personal (Code Civil, art. 686);

(c) Because a servitude in international law predicates an express grant of a sovereign right and involves an analogy to the relation of a *praedium dominans* and a *praedium serviens*; whereas by the Treaty of 1818 one State grants a liberty to fish, which is not a sovereign right, but a purely economic right, to the inhabitants of another State;

(d) Because the doctrine of international servitude in the sense which is now sought to be attributed to it originated in the peculiar and now obsolete conditions prevailing in the Holy Roman Empire of which the *domini terrae* were not fully sovereigns; they holding territory under the Roman Empire, subject at least theoretically, and in some respects also practically, to the courts of that Empire; their right being, moreover, rather of a civil than of a public nature, partaking more of the character of *dominium* than of *imperium*, and therefore certainly not a complete sovereignty. And because in contradistinction to this quasi-sovereignty with its incoherent attributes acquired at various times, by various means, and not impaired in its character by being incomplete in any one respect or by being limited in favour of another territory and its possessor, the modern State, and particularly Great Britain, has never admitted partition of sovereignty, owing to the constitution of a modern State requiring essential sovereignty and independence;

(e) Because this doctrine being but little suited to the principle of sovereignty which prevails in States under a system of constitutional government such as Great Britain and the United States, and to the present international relations of sovereign States, has found little, if any, support from modern publicists. It could therefore in the general interest of the community of nations, and of the Parties to this treaty, be affirmed by this Tribunal only on the express evidence of an international contract;

(f) Because even if these liberties of fishery constituted an international servitude, the servitude would derogate from the sovereignty

of the servient State only in³ so far as the exercise of the rights of sovereignty by the servient State would be contrary to the exercise of the servitude right by the dominant State. Whereas it is evident that, though every regulation of the fishery is to some extent a limitation, as it puts limits to the exercise of the fishery at will, yet such regulations as are reasonable and made for the purpose of securing and preserving the fishery and its exercise for the common benefit, are clearly to be distinguished from those restrictions and "molestations," the annulment of which was the purpose of the American demands formulated by Mr. ADAMS in 1782, and such regulations consequently cannot be held to be inconsistent with a servitude;

(g) Because the fishery to which the inhabitants of the United States were admitted in 1783, and again in 1818, was a regulated fishery, as is evidenced by the following regulations:

Act 15 Charles II, Cap. 16, s. 7 (1663) forbidding "to lay any seine or other net in or near any harbour in Newfoundland, whereby to take the spawn or young fry of the Poor-John, or for any other use or uses, except for the taking of bait only," which had not been superseded either by the order in council of March 10th, 1670, or by the statute 10 and XI Wm. III, Cap. 25, 1699. The order in council provides expressly for the obligation "to submit unto and to observe all rules and orders as are now, or hereafter shall be established," an obligation which cannot be read as referring only to the rules established by this very act, and having no reference to antecedent rules "as are now established." In a similar way, the statute of 1699 preserves in force prior legislation, conferring the freedom of fishery only "as fully and freely as at any time heretofore." The order in council, 1670, provides that the Admirals, who always were fishermen, arriving from an English or Welsh port, "see that His Majesty's rules and orders concerning the regulation of the fisheries are duly put in execution" (sec. 13). Likewise the Act 10 and XI, Wm. III, Cap. 25 (1699) provides that the Admirals do settle differences between the fishermen arising in respect of the places to be assigned to the different vessels. As to Nova Scotia, the proclamation of 1665 ordains that no one shall fish without license; that the licensed fishermen are obliged "to observe all laws and orders which now are made and published, or shall hereafter be made and published in this jurisdiction," and that they shall not fish on the Lord's day and shall not take fish at the time they come to spawn. The judgment of the Chief Justice of New-

foundland, October 26th, 1820, is not held by the Tribunal sufficient to set aside the proclamations referred to. After 1783, the statute 26 Geo. III, Cap. 26, 1786, forbids "the use, on the shores of Newfoundland, of seines or nets for catching cod by hauling on shore or taking into boat, with meshes less than 4 inches;" a prohibition which cannot be considered as limited to the bank fishery. The act for regulating the fisheries of New Brunswick, 1793, which forbids "the placing of nets or seines across any cove or creek in the Province so as to obstruct the natural course of fish," and which makes specific provision for fishing in the Harbour of St. John, as to the manner and time of fishing, cannot be read as being limited to fishing from the shore. The act for regulating the fishing on the coast of Northumberland (1799) contains very elaborate dispositions concerning the fisheries in the bay of Miramichi which were continued in 1823, 1829 and 1834. The statutes of Lower Canada, 1788 and 1807, forbid the throwing overboard of offal. The fact that these acts extend the prohibition over a greater distance than the first marine league from the shore may make them nonoperative against foreigners without the territorial limits of Great Britain, but is certainly no reason to deny their obligatory character for foreigners within these limits;

(h) Because the fact that Great Britain rarely exercised the right of regulation in the period immediately succeeding 1818 is to be explained by various circumstances and is not evidence of the non-existence of the right;

(i) Because the words "in common with British subjects" tend to confirm the opinion that the inhabitants of the United States were admitted to a regulated fishery;

(j) Because the statute of Great Britain, 1819, which gives legislative sanction to the Treaty of 1818, provides for the making of "regulations with relation to the taking, drying and curing of fish by inhabitants of the United States in 'common.'"

For the purpose of such proof, it is further contended by the United States, in this latter connection:

- (4) That the words "in common with British subjects" used in the Treaty should not be held as importing a common subjection to regulation, but as intending to negative a possible pretension on the part of the inhabitants of the United States to liberties of fishery exclusive of the right of British subjects to fish.

The Tribunal is unable to agree with this contention:

(a) Because such an interpretation is inconsistent with the historical basis of the American fishing liberty. The ground on which Mr. ADAMS founded the American right in 1782 was that the people then constituting the United States had always, when still under British rule, a part in these fisheries and that they must continue to enjoy their past right in the future. He proposed "that the subjects of His Britannic Majesty and the people of the United States shall continue to enjoy unmolested the right to take fish * * * where the inhabitants of both countries used, at any time heretofore, to fish." The theory of the partition of the fisheries, which by the American negotiators had been advanced with so much force, negatives the assumption that the United States could ever pretend to an exclusive right to fish on the British shores; and to insert a special disposition to that end would have been wholly superfluous;

(b) Because the words "in common" occur in the same connexion in the Treaty of 1818 as in the treaties of 1854 and 1871. It will certainly not be suggested that in these treaties of 1854 and 1871 the American negotiators meant by inserting the words "in common" to imply that without these words American citizens would be precluded from the right to fish on their own coasts and that, on American shores, British subjects should have an exclusive privilege. It would have been the very opposite of the concept of territorial waters to suppose that, without a special treaty-provision, British subjects could be excluded from fishing in British waters. Therefore that cannot have been the scope and the sense of the words "in common;"

(c) Because the words "in common" exclude the supposition that American inhabitants were at liberty to act at will for the purpose of taking fish, without any regard to the co-existing rights of other persons entitled to do the same thing; and because these words admit them only as members of a social community, subject to the ordinary duties binding upon the citizens of that community, as to the regulations made for the common benefit; thus avoiding the "bellum omnium contra omnes" which would otherwise arise in the exercise of this industry;

(d) Because these words are such as would naturally suggest themselves to the negotiators of 1818 if their intention had been to express a common subjection to regulations as well as a common right.

In the course of the argument it has also been alleged by the United States:

- (5) That the Treaty of 1818 should be held to have entailed a transfer or partition of sovereignty, in that it must in respect to the liberties of fishery be interpreted in its relation to the Treaty of 1783; and that this latter treaty was an act of partition of sovereignty and of separation, and as such was not annulled by the war of 1812.

Although the Tribunal is not called upon to decide the issue whether the treaty of 1783 was a treaty of partition or not, the questions involved therein having been set at rest by the subsequent Treaty of 1818, nevertheless the Tribunal could not forbear to consider the contention on account of the important bearing the controversy has upon the true interpretation of the Treaty of 1818. In that respect the Tribunal is of opinion:

(a) That the right to take fish was accorded as a condition of peace to a foreign people; wherefore the British negotiators refused to place the right of British subjects on the same footing with those of American inhabitants; and further, refused to insert the words also proposed by Mr. ADAMS — "continue to enjoy" — in the second branch of Art. III of the Treaty of 1783;

(b) That the Treaty of 1818 was in different terms, and very different in extent, from that of 1783, and was made for different considerations. It was, in other words, a new grant.

For the purpose of such proof it is further contended by the United States:

- (6) That as contemporary commercial treaties contain express provisions for submitting foreigners to local legislation, and the Treaty of 1818 contains no such provision, it should be held, *a contrario*, that inhabitants of the United States exercising these liberties are exempt from regulation.

The Tribunal is unable to agree with this contention:

(a) Because the commercial treaties contemplated did not admit foreigners to all and equal rights, seeing that local legislation excluded them from many rights of importance, e. g. that of holding land; and the purport of the provisions in question consequently was to preserve these discriminations. But no such discriminations existing in the common enjoyment of the fishery by American and British fishermen, no such provision was required;

(b) Because no proof is furnished of similar exemptions of foreigners from local legislation in default of treaty stipulations subjecting them thereto;

(c) Because no such express provision for subjection of the nationals of either Party to local law was made either in this treaty, in respect to their reciprocal admission to certain territories as agreed in Art. III, or in Art. III of the Treaty of 1794; although such subjection was clearly contemplated by the Parties.

For the purpose of such proof it is further contended by the United States:

- (7) That, as the liberty to dry and cure on the treaty coasts and to enter bays and harbours on the non-treaty coasts are both subjected to conditions, and the latter to specific restrictions, it should therefore be held that the liberty to fish should be subjected to no restrictions, as none are provided for in the treaty.

The Tribunal is unable to apply the principle of "*expressio unius exclusio alterius*" to this case:

(a) Because the conditions and restrictions as to the liberty to dry and cure on the shore and to enter the harbours are limitations of the rights themselves, and not restrictions of their exercise. Thus the right to dry and cure is limited in duration, and the right to enter bays and harbours is limited to particular purposes;

(b) Because these restrictions of the right to enter bays and harbours applying solely to American fishermen must have been expressed in the treaty, whereas regulations of the fishery, applying equally to American and British, are made by right of territorial sovereignty.

For the purpose of such proof it has been contended by the United States:

- (8) That Lord BATHURST in 1815 mentioned the American right under the Treaty of 1783 as a right to be exercised "at the discretion of the United States;" and that this should be held as to be derogatory to the claim of exclusive regulation by Great Britain.

But the Tribunal is unable to agree with this contention:

(a) Because these words implied only the necessity of an express stipulation for any liberty to use foreign territory at the pleasure of the grantee, without touching any question as to regulation;

(b) Because in this same letter Lord BATHURST characterized this right as a policy "temporary and experimental, depending on the use that might be made of it, on the condition of the islands and places where it was to be exercised, and the more general conveniences or inconveniences from a military, naval and commercial point of view;" so

that it cannot have been his intention to acknowledge the exclusion of British interference with this right;

(c) Because Lord BATHURST in his note to Governor Sir C. HAMILTON in 1819 orders the Governor to take care that the American fishery on the coast of Labrador be carried on *in the same manner* as previous to the late war; showing that he did not interpret the treaty just signed as a grant conveying absolute immunity from interference with the American fishery right.

For the purpose of such proof it is further contended by the United States:

- (9) That on various other occasions following the conclusion of the treaty, as evidenced by official correspondence, Great Britain made use of expressions inconsistent with the claim to a right of regulation.

The Tribunal, unwilling to invest such expressions with an importance entitling them to affect the general question, considers that such conflicting or inconsistent expressions as have been exposed on either side are sufficiently explained by their relations to ephemeral phases of a controversy of almost secular duration, and should be held to be without direct effect on the principal and present issues.

Now with regard to the second contention involved in Question I, as to whether the right of regulation can be reasonably exercised by Great Britain without the consent of the United States:

Considering that the recognition of a concurrent right of consent in the United States would affect the independence of Great Britain, which would become dependent on the Government of the United States for the exercise of its sovereign right of regulation, and considering that such a co-dominium would be contrary to the constitution of both sovereign States; the burden of proof is imposed on the United States to show that the independence of Great Britain was thus impaired by international contract in 1818 and that a co-dominium was created.

For the purpose of such proof it is contended by the United States:

- (10) That a concurrent right to cooperate in the making and enforcement of regulations is the only possible and proper security to their inhabitants for the enjoyment of their liberties of fishery, and that such a right must be held to be implied in the grant of those liberties by the treaty under interpretation.

The Tribunal is unable to accede to this claim on the ground of a right so implied:

(a) Because every State has to execute the obligations incurred by treaty *bona fide*, and is urged thereto by the ordinary sanctions of international law in regard to observance of treaty obligations. Such sanctions are, for instance, appeal to public opinion, publication of correspondence, censure by parliamentary vote, demand for arbitration with the odium attendant on a refusal to arbitrate, rupture of relations, reprisal, etc. But no reason has been shown why this treaty, in this respect, should be considered as different from every other treaty under which the right of a State to regulate the action of foreigners admitted by it on its territory is recognized;

(b) Because the exercise of such a right of consent by the United States would predicate an abandonment of its independence in this respect by Great Britain, and the recognition by the latter of a concurrent right of regulation in the United States. But the treaty conveys only a liberty to take fish in common, and neither directly nor indirectly conveys a joint right of regulation;

(c) Because the treaty does not convey a common right of fishery, but a liberty to fish in common. This is evidenced by the attitude of the United States Government in 1823, with respect to the relations of Great Britain and France in regard to the fishery;

(d) Because if the consent of the United States were requisite for the fishery a general veto would be accorded them, the full exercise of which would be socially subversive and would lead to the consequence of an unregulatable fishery;

(e) Because the United States can not by assent give legal force and validity to British legislation;

(f) Because the liberties to take fish in British territorial waters and to dry and cure fish on land in British territory are in principle on the same footing; but in practice a right of cooperation in the elaboration and enforcement of regulations in regard to the latter liberty (drying and curing fish on land) is unrealizable.

In any event, Great Britain, as the local sovereign, has the duty of preserving and protecting the fisheries. In so far as it is necessary for that purpose, Great Britain is not only entitled, but obliged, to provide for the protection and preservation of the fisheries; always remembering that the exercise of this right of legislation is limited by the obligation to execute the treaty in good faith. This has been admitted by counsel

and recognized by Great Britain in limiting the right of regulation to that of reasonable regulation. The inherent defect of this limitation of reasonableness, without any sanction except in diplomatic remonstrance, has been supplied by the submission to arbitral award as to existing regulations in accordance with Arts. II and III of the Special Agreement, and as to further regulation by the obligation to submit their reasonableness to an arbitral test in accordance with Art. IV of the Agreement.

It is finally contended by the United States:

That the United States did not expressly agree that the liberty granted to them could be subjected to any restriction that the grantor might choose to impose on the ground that in her judgment such restriction was reasonable. And that while admitting that all laws of a general character, controlling the conduct of men within the territory of Great Britain, are effective, binding and beyond objection by the United States, and competent to be made upon the sole determination of Great Britain or her colony, without accountability to anyone whomsoever; yet there is somewhere a line, beyond which it is not competent for Great Britain to go, or beyond which she cannot rightfully go, because to go beyond it would be an invasion of the right granted to the United States in 1818. That the legal effect of the grant of 1818 was not to leave the determination as to where that line is to be drawn to the uncontrolled judgment of the grantor, either upon the grantor's consideration as to what would be a reasonable exercise of its sovereignty over the British Empire, or upon the grantor's consideration of what would be a reasonable exercise thereof towards the grantee.

But this contention is founded on assumptions, which this Tribunal cannot accept for the following reasons in addition to those already set forth:

(a) Because the line by which the respective rights of both Parties accruing out of the treaty are to be circumscribed, can refer only to the right granted by the treaty; that is to say to the liberty of taking, drying and curing fish by American inhabitants in certain British waters in common with British subjects, and not to the exercise of rights of legislation by Great Britain not referred to in the treaty;

(b) Because a line which would limit the exercise of sovereignty of a State within the limits of its own territory can be drawn only on the ground of express stipulation, and not by implication from stipulations concerning a different subject-matter;

(c) Because the line in question is drawn according to the principle of international law that treaty obligations are to be executed in perfect good faith, therefore excluding the right to legislate *at will* concerning the subject-matter of the treaty, and limiting the exercise of sovereignty of the States bound by a treaty with respect to that subject-matter to such acts as are consistent with the treaty;

(d) Because on a true construction of the treaty the question does not arise whether the United States agreed that Great Britain should retain the right to legislate with regard to the fisheries in her own territory; but whether the treaty contains an abdication by Great Britain of the right which Great Britain, as the sovereign power, undoubtedly possessed when the treaty was made, to regulate those fisheries;

(e) Because the right to make reasonable regulations, not inconsistent with the obligations of the treaty, which is all that is claimed by Great Britain, for a fishery which both Parties admit requires regulation for its preservation, is not a restriction of or an invasion of the liberty granted to the inhabitants of the United States. This grant does not contain words to justify the assumption that the sovereignty of Great Britain upon its own territory was in any way affected; nor can words be found in the treaty transferring any part of that sovereignty to the United States. Great Britain assumed only duties with regard to the exercise of its sovereignty. The sovereignty of Great Britain over the coastal waters and territory of Newfoundland remains after the treaty as unimpaired as it was before. But from the treaty results an obligatory relation whereby the right of Great Britain to exercise its right of sovereignty by making regulations is limited to such regulations as are made in good faith, and are not in violation of the treaty;

(f) Finally to hold that the United States, the grantee of the fishing right, has a voice in the preparation of fishery legislation involves the recognition of a right in that country to participate in the internal legislation of Great Britain and her Colonies, and to that extent would reduce these countries to a state of dependence.

While therefore unable to concede the claim of the United States as based on the treaty, this Tribunal considers that such claim has been and is to some extent, conceded in the relations now existing between the two Parties. Whatever may have been the situation under the treaty of 1818 standing alone, the exercise of the right of regulation inherent in Great Britain has been, and is, limited by the repeated recognition of the obligations already referred to, by the limitations and liabilities

accepted in the Special Agreement, by the unequivocal position assumed by Great Britain in the presentation of its case before this Tribunal, and by the consequent view of this Tribunal that it would be consistent with all the circumstances, as revealed by this record, as to the duty of Great Britain, that she should submit the reasonableness of any future regulation to such an impartial arbitral test, affording full opportunity therefor, as is hereafter recommended under the authority of Article IV of the Special Agreement, whenever the reasonableness of any regulation is objected to or challenged by the United States in the manner, and within the time hereinafter specified in the said recommendation.

Now therefore this Tribunal decides and awards as follows:

The right of Great Britain to make regulations without the consent of the United States, as to the exercise of the liberty to take fish referred to in Article I of the Treaty of October 20th, 1818, in the form of municipal laws, ordinances or rules of Great Britain, Canada or Newfoundland is inherent to the sovereignty of Great Britain.

The exercise of that right by Great Britain is, however, limited by the said treaty in respect of the said liberties therein granted to the inhabitants of the United States in that such regulations must be made *bona fide* and must not be in violation of the said treaty.

Regulations which are (1) appropriate or necessary for the protection and preservation of such fisheries, or (2) desirable or necessary on grounds of public order and morals without unnecessarily interfering with the fishery itself, and in both cases equitable and fair as between local and American fishermen, and not so framed as to give unfairly an advantage to the former over the latter class, are not inconsistent with the obligation to execute the treaty in good faith, and are therefore reasonable and not in violation of the treaty.

For the decision of the question whether a regulation is or is not reasonable, as being or not in accordance with the dispositions of the treaty and not in violation thereof, the Treaty of 1818 contains no special provision. The settlement of differences in this respect that might arise thereafter was left to the ordinary means of diplomatic intercourse. By reason, however, of the form in which Question I is put, and by further reason of the admission of Great Britain by her counsel before this Tribunal that it is not now for either of the Parties to the treaty to determine the reasonableness of any regulation made by Great Britain, Canada or Newfoundland, the reasonableness of any such regulation, if contested, must be decided not by either of the Parties, but by an im-

partial authority in accordance with the principles hereinabove laid down, and in the manner proposed in the recommendations made by the Tribunal in virtue of Article IV of the Agreement.

The Tribunal further decides that Article IV of the Agreement is, as stated by counsel of the respective Parties at the argument, permanent in its effect, and not terminable by the expiration of the General Arbitration Treaty of 1908, between Great Britain and the United States.

In execution, therefore, of the responsibilities imposed upon this Tribunal in regard to Articles II, III and IV of the Special Agreement, we hereby pronounce in their regard as follows:

AS TO ARTICLE II

Pursuant to the provisions of this Article, hereinbefore cited, either Party has called the attention of this Tribunal to acts of the other claimed to be inconsistent with the true interpretation of the Treaty of 1818.

But in response to a request from the Tribunal, recorded in Protocol No. XXVI of 19th July, for an exposition of the grounds of such objections, the Parties replied as reported in Protocol No. XXX of 28th July to the following effect:

His Majesty's Government considered that it would be unnecessary to call upon the Tribunal for an opinion under the second clause of Article II, in regard to the executive act of the United States of America in sending warships to the territorial waters in question, in view of the recognized motives of the United States of America in taking this action and of the relations maintained by their representatives with the local authorities. And this being the sole act to which the attention of this Tribunal has been called by His Majesty's Government, no further action in their behalf is required from this Tribunal under Article II.

The United States of America presented a statement in which their claim that specific provisions of certain legislative and executive acts of the Governments of Canada and Newfoundland were inconsistent with the true interpretation of the Treaty of 1818 was based on the contention that these provisions were not "reasonable" within the meaning of Question I.

After calling upon this Tribunal to express an opinion on these acts, pursuant to the second clause of Article II, the United States of America pointed out in that statement that under Article III any ques-

tion regarding the reasonableness of any regulation might be referred by the Tribunal to a Commission of expert specialists, and expressed an intention of asking for such reference under certain circumstances.

The Tribunal having carefully considered the counter-statement presented on behalf of Great Britain at the session of August 2nd, is of opinion that the decision on the reasonableness of these regulations requires expert information about the fisheries themselves and an examination of the practical effect of a great number of these provisions in relation to the conditions surrounding the exercise of the liberty of fishery enjoyed by the inhabitants of the United States, as contemplated by Article III. No further action on behalf of the United States is therefore required from this Tribunal under Article II.

AS TO ARTICLE III

As provided in Article III, hereinbefore cited and above referred to, "any question regarding the reasonableness of any regulation, or otherwise, which requires an examination of the practical effect of any provisions surrounding the exercise of the liberty of fishery enjoyed by the inhabitants of the United States, or which requires expert information about the fisheries themselves, may be referred by this Tribunal to a Commission of expert specialists; one to be designated by each of the Parties hereto and the third, who shall not be a national of either Party, to be designated by the Tribunal."

The Tribunal now therefore calls upon the Parties to designate within one month their national Commissioners for the expert examination of the questions submitted.

As the third non-national Commissioner this Tribunal designates Doctor P. P. C. Hoek, Scientific Adviser for the fisheries of the Netherlands and if any necessity arises therefor a substitute may be appointed by the President of this Tribunal.

After a reasonable time, to be agreed on by the Parties, for the expert Commission to arrive at a conclusion, by conference, or, if necessary, by local inspection, the Tribunal shall, if convoked by the President at the request of either Party, thereupon at the earliest convenient date, reconvene to consider the report of the Commission, and if it be on the whole unanimous shall incorporate it in the award. If not on the whole unanimous, i. e., on all points which in the opinion of the Tribunal are of essential importance, the Tribunal shall make its award as to the regulations concerned after consideration of the conclusions of the expert Commissioners and after hearing argument by counsel.

But while recognizing its responsibilities to meet the obligations imposed on it under Article III of the Special Agreement, the Tribunal hereby recommends as an alternative to having recourse to a reconvention of this Tribunal, that the Parties should accept the unanimous opinion of the Commission or the opinion of the non-national Commissioner on any points in dispute as an arbitral award rendered under the provisions of Chapter IV of the Hague Convention of 1907.

AS TO ARTICLE IV.

Pursuant to the provisions of this Article, hereinbefore cited, this Tribunal recommends for the consideration of the Parties the following rules and method of procedure under which all questions which may arise in the future regarding the exercise of the liberties above referred to may be determined in accordance with the principles laid down in this award.

1

All future municipal laws, ordinances or rules for the regulation of the fishery by Great Britain in respect of (1) the hours, days or seasons when fish may be taken on the Treaty coasts; (2) the method, means and implements used in the taking of fish or in carrying on fishing operations; (3) any other regulation of a similar character shall be published in the London Gazette two months before going into operation.

Similar regulations by Canada or Newfoundland shall be similarly published in the Canada Gazette and the Newfoundland Gazette respectively.

2

If the Government of the United States considers any such laws or regulations inconsistent with the Treaty of 1818, it is entitled to so notify the Government of Great Britain within the two months referred to in Rule No. 1.

3

Any law or regulation so notified shall not come into effect with respect to inhabitants of the United States until the Permanent Mixed Fishery Commission has decided that the regulation is reasonable within the meaning of this award.

4

Permanent Mixed Fishery Commissions for Canada and Newfoundland respectively shall be established for the decision of such questions as to

the reasonableness of future regulations, as contemplated by Article IV of the Special Agreement; these Commissions shall consist of an expert national appointed by either Party for five years. The third member shall not be a national of either Party; he shall be nominated for five years by agreement of the Parties, or failing such agreement within two months, he shall be nominated by Her Majesty the Queen of the Netherlands. The two national members shall be convoked by the Government of Great Britain within one month from the date of notification by the Government of the United States.

5

The two national members having failed to agree within one month, within another month the full Commission, under the presidency of the umpire, is to be convoked by Great Britain. It must deliver its decision, if the two Governments do not agree otherwise, at the latest in three months. The Umpire shall conduct the procedure in accordance with that provided in Chapter IV of the Convention for the Pacific Settlement of International Disputes, except in so far as herein otherwise provided.

6

The form of convocation of the Commission including the terms of reference of the question at issue shall be as follows: "The provision hereinafter fully set forth of an Act dated _____, published in the _____ has been notified to the Government of Great Britain by the Government of the United States, under date of _____, as provided by the award of the Hague Tribunal of September 7th, 1910.

"Pursuant to the provisions of that award the Government of Great Britain hereby convokes the Permanent Mixed Fishery Commission for ^(Canada)
(Newfoundland), composed of _____ Commissioner for the United States of America, and of _____ Commissioner for ^(Canada)
(Newfoundland), which shall meet at _____ and render a decision within one month as to whether the provision so notified is reasonable and consistent with the Treaty of 1818, as interpreted by the award of the Hague Tribunal of September 7th, 1910, and if not, in what respect it is unreasonable and inconsistent therewith.

"Failing an agreement on this question within one month the Commission shall so notify the Government of Great Britain in order that

the further action required by that award may be taken for the decision of the above question.

"The provision is as follows: _____

7

The unanimous decision of the two national Commissioners, or the majority decision of the Umpire and one Commissioner, shall be final and binding.

QUESTION II

Have the inhabitants of the United States, while exercising the liberties referred to in said Article, a right to employ as members of the fishing crews of their vessels persons not inhabitants of the United States?

In regard to this question the United States claim in substance:

1. That the liberty assured to their inhabitants by the treaty plainly includes the right to use all the means customary or appropriate for fishing upon the sea, not only ships and nets and boats, but crews to handle the ships and the nets and the boats;
2. That no right to control or limit the means which these inhabitants shall use in fishing can be admitted unless it is provided in the terms of the treaty and no right to question the nationality or inhabitancy of the crews employed is contained in the terms of the treaty.

And Great Britain claims:

1. That the treaty confers the liberty to inhabitants of the United States exclusively;
2. That the Governments of Great Britain, Canada or Newfoundland may, without infraction of the treaty, prohibit persons from engaging as fishermen in American vessels.

Now considering (1) that the liberty to take fish is an economic right attributed by the treaty; (2) that it is attributed to inhabitants of the United States, without any mention of their nationality; (3) that the exercise of an economic right includes the right to employ servants; (4) that the right of employing servants has not been limited by the treaty to the employment of persons of a distinct nationality or inhabitancy; (5) that the liberty to take fish as an economic liberty refers not only to the individuals doing the manual act of fishing, but also to those for whose profit the fish are taken.

But considering, that the treaty does not intend to grant to indi-

vidual persons or to a class of persons the liberty to take fish in certain waters "in common," that is to say in company, with individual British subjects, in the sense that no law could forbid British subjects to take service on American fishing ships; (2) that the treaty intends to secure to the United States a share of the fisheries designated therein, not only in the interest of a certain class of individuals, but also in the interest of both the United States and Great Britain, as appears from the evidence and notably from the correspondence between Mr. ADAMS and Lord BATHURST in 1815; (3) that the inhabitants of the United States do not derive the liberty to take fish directly from the treaty, but from the United States Government as party to the treaty with Great Britain and moreover exercising the right to regulate the conditions under which its inhabitants may enjoy the granted liberty; (4) that it is in the interest of the inhabitants of the United States that the fishing liberty granted to them be restricted to exercise by them and removed from the enjoyment of other aliens not entitled by this treaty to participate in the fisheries; (5) that such restrictions have been throughout enacted in the British Statute of June 15, 1819, and that of June 3, 1824, to this effect, that no alien or stranger whatsoever shall fish in the waters designated therein, except in so far as by treaty thereto entitled, and that this exception will, in virtue of the Treaty of 1818, as hereinabove interpreted by this award, exempt from these statutes American fishermen fishing by the agency of non-inhabitant aliens employed in their service; (6) that the treaty does not affect the sovereign right of Great Britain as to aliens, non-inhabitants of the United States, nor the right of Great Britain to regulate the engagement of British subjects, while these aliens or British subjects are on British territory.

Now therefore, in view of the preceding considerations this Tribunal is of opinion that the inhabitants of the United States while exercising the liberties referred to in the said article have a right to employ, as members of the fishing crews of their vessels, persons not inhabitants of the United States.

But in view of the preceding considerations the Tribunal, to prevent any misunderstanding as to the effect of its award, expresses the opinion that non-inhabitants employed as members of the fishing crews of United States vessels derive no benefit or immunity from the treaty and it is so decided and awarded.

QUESTION III

Can the exercise by the inhabitants of the United States of the liberties referred to in the said Article be subjected, without the consent of the United States, to the requirements of entry or report at custom-houses or the payment of light or harbour or other dues, or to any other similar requirement or condition or exaction?

The Tribunal is of opinion as follows:

It is obvious that the liberties referred to in this question are those that relate to taking fish and to drying and curing fish on certain coasts as prescribed in the Treaty of October 20, 1818. The exercise of these liberties by the inhabitants of the United States in the prescribed waters to which they relate, has no reference to any commercial privileges which may or may not attach to such vessels by reason of any supposed authority outside the treaty, which itself confers no commercial privileges whatever upon the inhabitants of the United States or the vessels in which they may exercise the fishing liberty. It follows, therefore, that when the inhabitants of the United States are not seeking to exercise the commercial privileges accorded to trading vessels for the vessels in which they are exercising the granted liberty of fishing, they ought not to be subjected to requirements as to report and entry at custom houses that are only appropriate to the exercise of commercial privileges. The exercise of the fishing liberty is distinct from the exercise of commercial or trading privileges and it is not competent for Great Britain or her colonies to impose upon the former exactions only appropriate to the latter. The reasons for the requirements enumerated in the case of commercial vessels, have no relation to the case of fishing vessels.

We think, however, that the requirement that American fishing vessels should report, if proper conveniences and an opportunity for doing so are provided, is not unreasonable or inappropriate. Such a report, while serving the purpose of a notification of the presence of a fishing vessel in the treaty waters for the purpose of exercising the treaty liberty, while it gives an opportunity for a proper surveillance of such vessel by revenue officers, may also serve to afford to such fishing vessel protection from interference in the exercise of the fishing liberty. There should be no such requirement; however, unless reasonably convenient opportunity therefor be afforded in person or by telegraph, at a custom-house or to a customs official.

The Tribunal is also of opinion that light and harbor dues, if not imposed on Newfoundland fishermen, should not be imposed on American

fishermen while exercising the liberty granted by the treaty. To impose such dues on American fishermen only would constitute an unfair discrimination between them and Newfoundland fishermen and one inconsistent with the liberty granted to American fishermen to take fish, etc., "in common with the subjects of His Britannic Majesty."

Further, the Tribunal considers that the fulfilment of the requirement as to report by fishing vessels on arrival at the fishery would be greatly facilitated in the interests of both parties by the adoption of a system of registration, and distinctive marking of the fishing boats of both parties, analogous to that established by Articles V to XIII, inclusive, of the International Convention signed at The Hague, 8 May, 1882, for the regulation of the North Sea Fisheries.

The Tribunal therefore decides and awards as follows:

The requirement that an American fishing vessel should report, if proper conveniences for doing so are at hand, is not unreasonable, for the reasons stated in the foregoing opinion. There should be no such requirement, however, unless there be reasonably convenient opportunity afforded to report in person or by telegraph, either at a custom-house or to a customs official.

But the exercise of the fishing liberty by the inhabitants of the United States should not be subjected to the purely commercial formalities of report, entry and clearance at a custom-house, nor to light, harbor or other dues not imposed upon Newfoundland fishermen.

QUESTION IV

Under the provisions of the said Article that the American fishermen shall be admitted to enter certain bays or harbours for shelter, repairs, wood, or water, and for no other purpose whatever, but that they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein or in any other manner whatever abusing the privileges thereby reserved to them, is it permissible to impose restrictions making the exercise of such privileges conditional upon the payment of light or harbour or other dues, or entering or reporting at custom-houses or any similar conditions?

The Tribunal is of opinion that the provision in the first Article of the Treaty of October 20th, 1818, admitting American fishermen to enter certain bays or harbors for shelter, repairs, wood and water, and for no other purpose whatever, is an exercise in large measure of those duties of hospitality and humanity which all civilized nations impose upon themselves and expect the performance of from others. The enumerated purposes for which entry is permitted all relate to the exigencies in which

those who pursue their perilous calling on the sea may be involved. The proviso which appears in the first article of the said treaty immediately after the so-called renunciation clause, was doubtless due to a recognition by Great Britain of what was expected from the humanity and civilization of the then leading commercial nation of the world. To impose restrictions making the exercise of such privileges conditional upon the payment of light, harbor or other dues, or entering and reporting at custom-houses, or any similar conditions would be inconsistent with the grounds upon which such privileges rest and therefore is not permissible.

And it is decided and awarded that such restrictions are not permissible.

It seems reasonable, however, in order that these privileges accorded by Great Britain on these grounds of hospitality and humanity should not be abused, that the American fishermen entering such bays for any of the four purposes aforesaid and remaining more than 48 hours therein, should be required, if thought necessary by Great Britain or the Colonial Government, to report, either in person or by telegraph, at a custom-house or to a customs official, if reasonably convenient opportunity therefor is afforded.

And it is so decided and awarded.

QUESTION V

From where must be measured the "three marine miles of any of the coasts, bays, creeks, or harbours" referred to in the said Article?

In regard to this question, Great Britain claims that the renunciation applies to all bays generally and

- . The United States contend that it applies to bays of a certain class or condition.

Now, considering that the treaty used the general term "bays" without qualification, the Tribunal is of opinion that these words of the treaty must be interpreted in a general sense as applying to every bay on the coast in question that might be reasonably supposed to have been considered as a bay by the negotiators of the treaty under the general conditions then prevailing, unless the United States can adduce satisfactory proof that any restrictions or qualifications of the general use of the term were or should have been present to their minds.

And for the purpose of such proof the United States contend:

1°. That while a State may renounce the treaty right to fish in foreign territorial waters, it cannot renounce the natural right to fish on the high seas.

But the Tribunal is unable to agree with this contention. Because though a State cannot grant rights on the high seas it certainly can abandon the exercise of its right to fish on the high seas within certain definite limits. Such an abandonment was made with respect to their fishing rights in the waters in question by France and Spain in 1763. By a convention between the United Kingdom and the United States in 1846, the two countries assumed ownership over waters in Fuca Straits at distances from the shore as great as 17 miles.

The United States contend moreover:

2°. That by the use of the term "liberty to fish" the United States manifested the intention to renounce the liberty in the waters referred to only in so far as that liberty was dependent upon or derived from a concession on the part of Great Britain, and not to renounce the right to fish in those waters where it was enjoyed by virtue of their natural right as an independent State.

But the Tribunal is unable to agree with this contention:

(a) Because the term "liberty to fish" was used in the renunciatory clause of the Treaty of 1818 because the same term had been previously used in the Treaty of 1783 which gave the liberty; and it was proper to use in the renunciation clause the same term that was used in the grant with respect to the object of the grant; and, in view of the terms of the grant, it would have been improper to use the term "right" in the renunciation. Therefore the conclusion drawn from the use of the term "liberty" instead of the term "right" is not justified;

(b) Because the term "liberty" was a term properly applicable to the renunciation which referred not only to fishing in the territorial waters but also to drying and curing on the shore. This latter right was undoubtedly held under the provisions of the treaty and was not a right accruing to the United States by virtue of any principle of international law.

3°. The United States also contend that the term "bays of His Britannic Majesty's Dominions" in the renunciatory clause must be read as including only those bays which were under the territorial sovereignty of Great Britain.

But the Tribunal is unable to accept this contention:

(a) Because the description of the coast on which the fishery is to

be exercised by the inhabitants of the United States is expressed throughout the Treaty of 1818 in geographical terms and not by reference to political control; the treaty describes the coast as contained between capes;

(b) Because to express the political concept of dominion as equivalent to sovereignty, the word "dominion" in the singular would have been an adequate term and not "dominions" in the plural; this latter term having a recognized and well settled meaning as descriptive of those portions of the earth which owe political allegiance to His Majesty; e. g. "His Britannic Majesty's Dominions beyond the Seas."

4°. It has been further contended by the United States that the renunciation applies only to bays six miles or less in width "*inter fauces terrae*," those bays only being territorial bays, because the three mile rule is, as shown by this treaty, a principle of international law applicable to coasts and should be strictly and systematically applied to bays.

But the Tribunal is unable to agree with this contention:

(a) Because admittedly the geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. Thus conditions of national and territorial integrity, of defence, of commerce and of industry are all vitally concerned with the control of the bays penetrating the national coast line. This interest varies, speaking generally in proportion to the penetration inland of the bay; but as no principle of international law recognizes any specified relation between the concavity of the bay and the requirements for control by the territorial sovereignty, this Tribunal is unable to qualify by the application of any new principle its interpretation of the Treaty of 1818 as excluding bays in general from the strict and systematic application of the three mile rule; nor can this Tribunal take cognizance in this connection of other principles concerning the territorial sovereignty over bays such as ten mile or twelve mile limits of exclusion based on international acts subsequent to the Treaty of 1818 and relating to coasts of a different configuration and conditions of a different character;

(b) Because the opinion of jurists and publicists quoted in the proceedings conduce to the opinion that speaking generally the three mile rule should not be strictly and systematically applied to bays;

(c) Because the treaties referring to these coasts, antedating the Treaty of 1818, made special provisions as to bays, such as the treaties

of 1686 and 1713 between Great Britain and France, and especially the Treaty of 1778 between the United States and France. Likewise JAY's Treaty of 1794 Art. 25, distinguished bays from the space "within cannon-shot of the coast" in regard to the right of seizure in times of war. If the proposed treaty of 1806 and the treaty of 1818 contained no disposition to that effect, the explanation may be found in the fact that the first extended the marginal belt to five miles, and also in the circumstance that the American proposition of 1818 in that respect was not limited to "bays," but extended to "chambers formed by headlands" and to "five marine miles from a right line from one headland to another," a proposition which in the times of the Napoleonic wars would have affected to a very large extent the operations of the British navy;

(d) Because it has not been shown by the documents and correspondence in evidence here that the application of the three mile rule to bays was present to the minds of the negotiators in 1818 and they could not reasonably have been expected either to presume it or to provide against its presumption;

(e) Because it is difficult to explain the words in Art. III of the treaty under interpretation "country * * * together with its bays, harbours and creeks" otherwise than that all bays without distinction as to their width were, in the opinion of the negotiators, part of the territory;

(f) Because from the information before this Tribunal it is evident that the three mile rule is not applied to bays strictly or systematically either by the United States or by any other Power;

(g) It has been recognized by the United States that bays stand apart, and that in respect of them territorial jurisdiction may be exercised farther than the marginal belt in the case of Delaware bay by the report of the United States Attorney General of May 19th 1793; and the letter of Mr. JEFFERSON to Mr. GENET of Nov. 8th 1793 declares the bays of the United States generally to be, "as being land-locked, within the body of the United States."

5°. In this latter regard it is further contended by the United States, that such exceptions only should be made from the application of the three mile rule to bays as are sanctioned by conventions and established usage; that all exceptions for which the United States of America were responsible are so sanctioned; and that His Majesty's Government are unable to provide evidence to show that the bays concerned by the Treaty of 1818 could be claimed as ex-

ceptions on these grounds either generally, or except possibly in one or two cases, specifically.

But the Tribunal while recognizing that conventions and established usage might be considered as the basis for claiming as territorial those bays which on this ground might be called historic bays, and that such claim should be held valid in the absence of any principle of international law on the subject; nevertheless is unable to apply this, *a contrario*, so as to subject the bays in question to the three mile rule, as desired by the United States:

(a) Because Great Britain has during this controversy asserted a claim to these bays generally, and has enforced such claim specifically in statutes or otherwise, in regard to the more important bays such as Chaleurs, Conception and Miramichi;

(b) Because neither should such relaxations of this claim, as are in evidence, be construed as renunciations of it; nor should omissions to enforce the claim in regard to bays as to which no controversy arose, be so construed. Such a construction by this Tribunal would not only be intrinsically inequitable but internationally injurious; in that it would discourage conciliatory diplomatic transactions and encourage the assertion of extreme claims in their fullest extent;

(c) Because any such relaxations in the extreme claim of Great Britain in its international relations are compensated by recognitions of it in the same sphere by the United States; notably in relations with France for instance in 1823 when they applied to Great Britain for the protection of their fishery in the bays on the western coast of Newfoundland, whence they had been driven by French war vessels on the ground of the pretended exclusive right of the French. Though they never asserted that their fishermen had been disturbed within the three mile zone, only alleging that the disturbance had taken place in the bays, they claimed to be protected by Great Britain for having been molested in waters which were, as Mr. RUSSELL stated "clearly within the jurisdiction and sovereignty of Great Britain."

6°. It has been contended by the United States that the words "coasts, bays, creeks or harbours" are here used only to express different parts of the coast and are intended to express and be equivalent to the word "coast," whereby the three marine miles would be measured from the sinuosities of the coast and the renunciation would apply only to the waters of bays within three miles.

But the Tribunal is unable to agree with this contention:

(a) Because it is a principle of interpretation that words in a document ought not to be considered as being without any meaning if there is not specific evidence to that purpose and the interpretation referred to would lead to the consequence, practically, of reading the words "bays, coasts and harbours" out of the treaty; so that it would read "within three miles of any of the coasts" including therein the coasts of the bays and harbours;

(b) Because the word "therein" in the proviso—"restrictions necessary to prevent their taking, drying or curing fish therein" can refer only to "bays," and not to the belt of three miles along the coast; and can be explained only on the supposition that the words "bays, creeks and harbours" are to be understood in their usual ordinary sense and not in an artificially restricted sense of bays within the three mile belt;

(c) Because the practical distinction for the purpose of this fishery between coasts and bays and the exceptional conditions pertaining to the latter has been shown from the correspondence and the documents in evidence, especially the Treaty of 1783, to have been in all probability present to the minds of the negotiators of the Treaty of 1818;

(d) Because the existence of this distinction is confirmed in the same article of the treaty by the proviso permitting the United States fishermen to enter bays for certain purposes;

(e) Because the word "coasts" is used in the plural form whereas the contention would require its use in the singular;

(f) Because the Tribunal is unable to understand the term "bays" in the renunciatory clause in other than its geographical sense, by which a bay is to be considered as an indentation of the coast, bearing a configuration of a particular character easy to determine specifically, but difficult to describe generally.

The negotiators of the Treaty of 1818 did probably not trouble themselves with subtle theories concerning the notion of "bays;" they most probably thought that everybody would know what was a bay. In this popular sense the term must be interpreted in the treaty. The interpretation must take into account all the individual circumstances which for any one of the different bays are to be appreciated, the relation of its width to the length of penetration inland, the possibility and the necessity of its being defended by the State in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from

the highways of nations on the open sea and other circumstances not possible to enumerate in general.

For these reasons the Tribunal decides and awards:

In case of bays the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the three marine miles are to be measured following the sinuosities of the coast.

But considering the Tribunal cannot overlook that this answer to Question V, although correct in principle and the only one possible in view of the want of a sufficient basis for a more concrete answer, is not entirely satisfactory as to its practical applicability, and that it leaves room for doubts and differences in practice. Therefore the Tribunal considers it its duty to render the decision more practicable and to remove the danger of future differences by adjoining to it, a recommendation in virtue of the responsibilities imposed by Art. IV of the Special Agreement.

Considering, moreover, that in treaties with France, with the North German Confederation and the German Empire and likewise in the North Sea Convention, Great Britain has adopted for similar cases the rule that only bays of ten miles width should be considered as those wherein the fishing is reserved to nationals. And that in the course of the negotiations between Great Britain and the United States a similar rule has been on various occasions proposed and adopted by Great Britain in instructions to the naval officers stationed on these coasts. And that though these circumstances are not sufficient to constitute this a principle of international law, it seems reasonable to propose this rule with certain exceptions, all the more that this rule with such exceptions has already formed the basis of an agreement between the two Powers.

Now therefore this Tribunal in pursuance of the provisions of art. IV hereby recommends for the consideration and acceptance of the High Contracting Parties the following rules and method of procedure for determining the limits of the bays hereinbefore enumerated.

1

In every bay not hereinafter specifically provided for the limits of exclusion shall be drawn three miles seaward from a straight line across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles.

In the following bays where the configuration of the coast and the local climatic conditions are such that foreign fishermen when within the geographic headlands might reasonably and *bona fide* believe themselves on the high seas, the limits of exclusion shall be drawn in each case between the headlands hereinafter specified as being those at and within which such fishermen might be reasonably expected to recognize the bay under average conditions.

For the Baie des Chaleurs the line from the Light at Birch Point on Miscou Island to Macquereau Point Light; for the Bay of Miramichi, the line from the Light at Point Escuminac to the Light on the Eastern Point of Tabisintac Gully; for Egmont Bay, in Prince Edward Island, the line from the Light at Cape Egmont to the Light at West Point; and off St. Ann's Bay, in the Province of Nova Scotia, the line from the Light at Point Anconi to the nearest point on the opposite shore of the mainland.

For Fortune Bay, in Newfoundland, the line from Connaigre Head to the Light on the Southeasterly end of Brunet Island, thence to Fortune Head.

For or near the following bays the limits of exclusion shall be three marine miles seawards from the following lines, namely:

For or near Barrington Bay, in Nova Scotia, the line from the Light on Stoddart Island to the Light on the south point of Cape Sable, thence to the light at Baccaro Point; at Chedabucto and St. Peter's Bays, the line from Cranberry Island Light to Green Island Light, thence to Point Rouge; for Mira Bay, the line from the Light on the east point of Scatari Island to the northeasterly point of Cape Morien; and at Placentia Bay, in Newfoundland, the line from Latine Point on the eastern mainland shore, to the most southerly point of Red Island, thence by the most southerly point of Mersaheen Island to the mainland.

Long Island and Bryer Island, on St. Mary's Bay, in Nova Scotia, shall, for the purpose of delimitation, be taken as the coasts of such bays.

It is understood that nothing in these rules refers either to the Bay of Fundy considered as a whole apart from its bays and creeks or as to the innocent passage through the Gut of Canso, which were excluded by the agreement made by exchange of notes between Mr. Bacon and Mr. Bryce dated February 21st, 1909 and March 4th, 1909;

or to Conception Bay, which was provided for by the decision of the Privy Council in the case of the *Direct United States Cable Company v. The Anglo-American Telegraph Company*, in which decision the United States have acquiesced.

QUESTION VI

Have the inhabitants of the United States the liberty under the said Article or otherwise, to take fish in the bays, harbours, and creeks on that part of the southern coast of Newfoundland which extends from Cape Ray to Rameau Islands, or on the western and northern coasts of Newfoundland from Cape Ray to Quirpon Islands, or on the Magdalen Islands?

In regard to this question, it is contended by the United States that the inhabitants of the United States have the liberty under Art. I of the treaty of taking fish in the bays, harbours and creeks on that part of the southern coast of Newfoundland which extends from Cape Ray to Rameau Islands or on the western and northern coasts of Newfoundland from Cape Ray to Quirpon Islands and on the Magdalen Islands. It is contended by Great Britain that they have no such liberty.

Now considering that the evidence seems to show that the intention of the Parties to the Treaty of 1818, as indicated by the records of the negotiations and by the subsequent attitude of the Governments was to admit the United States to such fishery, this Tribunal is of opinion that it is incumbent on Great Britain to produce satisfactory proof that the United States are not so entitled under the treaty.

For this purpose Great Britain points to the fact that whereas the treaty grants to American fishermen liberty to take fish "on the coasts, bays, harbours, and creeks from Mount Joly on the southern coast of Labrador" the liberty is granted to the "coast" only of Newfoundland and to the "shore" only of the Magdalen Islands; and argues that evidence can be found in the correspondence submitted indicating an intention to exclude Americans from Newfoundland bays on the treaty coast, and that no value would have been attached at that time by the United States Government to the liberty of fishing in such bays because there was no cod fishery there as there was in the bays of Labrador.

But the Tribunal is unable to agree with this contention:

(a) Because the words "part of the southern coast....from....to" and the words "western and northern coast....from....to,"

clearly indicate one uninterrupted coast-line; and there is no reason to read into the words "coasts" a contradistinction to bays, in order to exclude bays. On the contrary, as already held in the answer to Question V, the words "liberty, forever, to dry and cure fish in any of the unsettled bays, harbours and creeks of the southern part of the coast of Newfoundland hereabove described," indicate that in the meaning of the treaty, as in all the preceding treaties relating to the same territories, the words coast, coasts, harbours, bays, etc., are used, without attaching to the word "coast" the specific meaning of excluding bays. Thus in the provision of the Treaty of 1783 giving liberty "to take fish on such part of the coast of Newfoundland as British fishermen shall use;" the word "coast" necessarily includes bays, because if the intention had been to prohibit the entering of the bays for fishing the following words "but not to dry or cure the same on that island," would have no meaning. The contention that in the Treaty of 1783 the word "bays" is inserted lest otherwise Great Britain would have had the right to exclude the Americans to the three mile line, is inadmissible, because in that treaty that line is not mentioned;

(b) Because the correspondence between Mr. ADAMS and Lord BATHURST also shows that during the negotiations for the treaty the United States demanded the former rights enjoyed under the Treaty of 1783, and that Lord BATHURST in the letter of 30th October 1815 made no objection to granting those "former rights" "placed under some modifications," which latter did not relate to the right of fishing in bays, but only to the "preoccupation of British harbours and creeks by the fishing vessels of the United States and the forcible exclusion of British subjects where the fishery might be most advantageously conducted," and "to the clandestine introduction of prohibited goods into the British colonies." It may be therefore assumed that the word "coast" is used in both treaties in the same sense, including bays;

(c) Because the treaty expressly allows the liberty to dry and cure in the unsettled bays, etc., of the southern part of the coast of Newfoundland, and this shows that, a fortiori, the taking of fish in those bays is also allowed; because the fishing liberty was a lesser burden than the grant to cure and dry, and the restrictive clauses never refer to fishing in contradistinction to drying, but always to drying in contradistinction to fishing. Fishing is granted without drying, never drying without fishing;

(d) Because there is not sufficient evidence to show that the enumeration of the component parts of the coast of Labrador was made in order to discriminate between the coast of Labrador and the coast of Newfoundland;

(e) Because the statement that there is no codfish in the bays of Newfoundland and that the Americans only took interest in the codfishery is not proved; and evidence to the contrary is to be found in Mr. JOHN ADAMS Journal of Peace Negotiations of November 25, 1782;

(f) Because the treaty grants the right to take fish of every kind, and not only codfish;

(g) Because the evidence shows that, in 1823, the Americans were fishing in Newfoundland bays and that Great Britain when summoned to protect them against expulsion therefrom by the French did not deny their right to enter such bays.

Therefore this Tribunal is of opinion that American inhabitants are entitled to fish in the bays, creeks and harbours of the treaty coasts of Newfoundland and the Magdalen Islands and it is so decided and awarded.

QUESTION VII

Are the inhabitants of the United States whose vessels resort to the treaty coasts for the purpose of exercising the liberties referred to in Article I of the Treaty of 1818 entitled to have for those vessels, when duly authorized by the United States in that behalf, the commercial privileges on the treaty coasts accorded by agreement or otherwise to United States trading vessels generally?

Now assuming that commercial privileges on the treaty coasts are accorded by agreement or otherwise to United States trading vessels generally, without any exception, the inhabitants of the United States, whose vessels resort to the same coasts for the purpose of exercising the liberties referred to in Article I of the Treaty of 1818, are entitled to have for those vessels when duly authorized by the United States in that behalf, the above mentioned commercial privileges, the treaty containing nothing to the contrary. But they cannot at the same time and during the same voyage exercise their treaty rights and enjoy their commercial privileges, because treaty rights and commercial privileges are submitted to different rules, regulations and restraints.

For these reasons this Tribunal is of opinion that the inhabitants of the United States are so entitled in so far as concerns this treaty, there being nothing in its provisions to disentitle them provided the

treaty liberty of fishing and the commercial privileges are not exercised concurrently and it is so decided and awarded.

Done at the Hague, in the Permanent Court of Arbitration, in triplicate original, September 7th, 1910.

H. LAMMASCH.

A. F. DE SAVORNIN LOHMAN.

GEORGE GRAY.

C. FITZPATRICK.

LUIS M. DRAGO.

Signing the Award, I state pursuant to Article IX clause 2 of the Special Agreement my dissent from the majority of the Tribunal in respect to the considerations and enacting part of the Award as to Question V.

Grounds for this dissent have been filed at the International Bureau of the Permanent Court of Arbitration.

LUIS M. DRAGO.

GROUND FOR THE DISSENT

TO

THE AWARD ON QUESTION V

BY DR. LUIS M. DRAGO

Counsel for Great Britain have very clearly stated that according to their contention the territoriality of the bays referred to in the Treaty of 1818 is immaterial because whether they are or are not territorial, the United States should be excluded from fishing in them by the terms of the renunciatory clause, which simply refers to "bays, creeks or harbours of His Britannic Majesty's Dominions" without any other qualification or description. If that were so, the necessity might arise of discussing whether or not a nation has the right to exclude another by contract or otherwise from any portion or portions of the high seas. But in my opinion the Tribunal need not concern itself with such general question, the wording of the treaty being clear enough to decide the point at issue.

Article I begins with the statement that differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof to take, dry and cure fish on "certain coasts, bays, harbours

and creeks of His Britannic Majesty's Dominions in America," and then proceeds to locate the specific portions of the coast with its corresponding indentations, in which the liberty of taking, drying and curing fish should be exercised. The renunciatory clause, which the Tribunal is called upon to construe, runs thus: "And the United States hereby renounce, forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry or cure fish on, or within three marine miles of any of the Coasts, Bays, Creeks or Harbours of His Britannic Majesty's Dominions in America not included within the above mentioned limits." This language does not lend itself to different constructions. If the bays in which the liberty has been renounced are those "of His Britannic Majesty's Dominions in America," they must necessarily be territorial bays, because in so far as they are not so considered they should belong to the high seas and consequently form no part of His Britannic Majesty's Dominions, which, by definition, do not extend to the high seas. It cannot be said, as has been suggested, that the use of the word "dominions," in the plural, implies a different meaning than would be conveyed by the same term as used in the singular, so that in the present case, "the British dominions in America" ought to be considered as a mere geographical expression, without reference to any right of sovereignty or "*dominion*." It seems to me, on the contrary, that "dominions," or "possessions," or "estates," or such other equivalent terms, simply designate the places over which the "dominion" or property rights are exercised. Where there is no possibility of appropriation or dominion, as on the high seas, we cannot speak of dominions. The "dominions" extend exactly to the point which the "dominion" reaches; they are simply the actual or physical thing over which the abstract power or authority, the *right*, as given to the proprietor or the ruler, applies. The interpretation as to the territoriality of the bays as mentioned in the renunciatory clause of the treaty appears stronger when considering that the United States specifically renounced the "liberty," not the "right" to fish or to cure and dry fish. "The United States renounce, forever, any *liberty* heretofore enjoyed or claimed, to take, cure or dry fish on, or within three marine miles of any of the coasts, bays, creeks or harbours of His Britannic Majesty's Dominions in America." It is well known that the negotiators of the Treaty of 1783 gave a very different meaning to the terms *liberty* and *right*, as distinguished from each other. In this connection Mr.

ADAMS' Journal may be recited. To this Journal the British Counter Case refers in the following terms: "From an entry in Mr. ADAMS' Journal it appears that he drafted an article by which he distinguished the *right* to take fish (both on the high seas and on the shores) and the *liberty* to take and cure fish on the land. But on the following day he presented to the British negotiators a draft in which he distinguishes between the '*right*' to take fish on the high seas, and the '*liberty*' to take fish on the '*coasts*,' and to dry and cure fish on the land * * *. The British Commissioner called attention to the distinction thus suggested by Mr. ADAMS and proposed that the word *liberty* should be applied to the privileges both on the water and on the land. Mr. ADAMS thereupon rose up and made a vehement protest, as is recorded in his Diary, against the suggestion that the United States enjoyed the fishing on the banks of Newfoundland by any other title than that of *right*. * * *. The application of the word *liberty* to the coast fishery was left as Mr. ADAMS proposed." "The incident," proceeds the British Case, "is of importance, since it shows that the difference between the two phrases was intentional." (British Counter Case, page 17.) And the British Argument emphasizes again the difference. "More cogent still is the distinction between the words *right* and *liberty*. The word *right* is applied to the sea fisheries, and the word *liberty* to the shore fisheries. The history of the negotiations shows that this distinction was advisedly adopted." If then a *liberty* is a grant and not the recognition of a *right*; if, as the British Case, Counter Case and Argument recognize, the United States had the right to fish in the open sea in contradistinction with the *liberty* to fish near the shores or portions of the shores, and if what has been renounced in the words of the treaty is the "*liberty*" to fish on, or within three miles of the bays, creeks and harbours of His Britannic Majesty's Dominions, it clearly follows that such *liberty* and the corresponding renunciation refers only to such portions of the bays which were under the sovereignty of Great Britain and not to such other portions, if any, as form part of the high seas.

And thus it appears that far from being immaterial the territoriality of bays is of the utmost importance. The treaty not containing any rule or indication upon the subject, the Tribunal cannot help a decision as to this point, which involves the second branch of the British contention that all so-called bays are not only geographical but wholly territorial as well, and subject to the jurisdiction of Great Britain.

The situation was very accurately described on almost the same lines as above stated by the British Memorandum sent in 1870 by the Earl of Kimberley to Governor Sir JOHN YOUNG: "The right of Great Britain to exclude American fishermen from waters within three miles of the coasts is unambiguous, and, it is believed, uncontested. But there appears to be some doubt what are the waters described as within three miles of bays, creeks or harbors. When a bay is less than six miles broad its waters are within the three mile limit, and therefore clearly within the meaning of the treaty; *but when it is more than that breadth, the question arises whether it is a bay of Her Britannic Majesty's Dominions.* This is a question which has to be considered in each particular case with regard to international law and usage. When such a bay is not a bay of Her Majesty's dominions, the American fishermen shall be entitled to fish in it, except within three marine miles of the 'coast;' when it is a bay of Her Majesty's dominions they will not be entitled to fish within three miles of it, that is to say (it is presumed) within three miles of a line drawn from headland to headland." (American Case Appendix, page 629.)

Now, it must be stated in the first place that there does not seem to exist any general rule of international law which may be considered final, even in what refers to the marginal belt of territorial waters. The old rule of the cannon-shot, crystallized into the present three marine miles measured from low water mark, may be modified at a later period inasmuch as certain nations claim a wider jurisdiction and an extension has already been recommended by the Institute of International Law. There is an obvious reason for that. The marginal strip of territorial waters based originally on the cannon-shot, was founded on the necessity of the riparian State to protect itself from outward attack, by providing something in the nature of an insulating zone, which very reasonably should be extended with the accrued possibility of offense due to the wider range of modern ordnance. In what refers to bays, it has been proposed as a general rule (subject to certain important exceptions) that the marginal belt of territorial waters should follow the sinuosities of the coast more or less in the manner held by the United States in the present contention, so that the marginal belt being of three miles, as in the treaty under consideration, only such bays should be held as territorial as have an entrance not wider than six miles. (See Sir THOMAS BARCLAY'S Report to Institute of International Law, 1894, page 129, in which he also strongly recom-

mends these limits.) This is the doctrine which WESTLAKE, the eminent English writer on International Law, has summed up in very few words: "As to bays," he says, "if the entrance to one of them is not more than twice the width of the littoral sea enjoyed by the country in question—that is, not more than six sea miles in the ordinary case, eight in that of Norway, and so forth—there is no access from the open sea to the bay except through the territorial water of that country, and the inner part of the bay will belong to that country no matter how widely it may expand. The line drawn from shore to shore at the part where, in approaching from the open sea, the width first contracts to that mentioned, will take the place of the line of low water, and the littoral sea belonging to the State will be measured outwards from that line to the distance of three miles or more, proper to the State;" (WESTLAKE, Vol. 1, page 187). But the learned author takes care to add: "But although this is the general rule it often meets with an exception in the case of bays which penetrate deep into the land and are called gulfs. Many of these are recognized by immemorial usage as territorial sea of the States into which they penetrate, notwithstanding that their entrance is wider than the general rule for bays would give as a limit for such appropriation." And he proceeds to quote as examples of this kind the Bay of Conception in Newfoundland, which he considers as wholly British, Chesapeake and Delaware Bays, which belong to the United States, and others. (*Ibid*, page 188.) The Institute of International Law, in its Annual Meeting of 1894, recommended a marginal belt of six miles for the general line of the coast and as a consequence established that for bays the line should be drawn up across at the nearest portion of the entrance toward the sea where the distance between the two sides do not exceed twelve miles. But the learned association very wisely added a proviso to the effect, "that bays should be so considered and measured *unless a continuous and established usage* has sanctioned a greater breadth." Many great authorities are agreed as to that. Counsel for the United States proclaimed the right to the exclusive jurisdiction of certain bays, no matter what the width of their entrance should be, when the littoral nation has asserted its right to take it into their jurisdiction upon reasons which go always back to the doctrine of protection. Lord BLAKBURN, one of the most eminent of English judges, in delivering the opinion of the Privy Council about Conception Bay in Newfoundland, adhered to the same doctrine when he asserted the territoriality

of that branch of the sea, giving as a reason for such finding "that the British Government for a long period had exercised dominion over this bay and its claim had been acquiesced in by other nations, so as to show that the bay had been for a long time occupied exclusively by Great Britain, a circumstance which, in the tribunals of any country, would be very important." "And moreover," he added, "the British Legislature has, by Acts of Parliament, declared it to be part of the British territory, and part of the country made subject to the legislation of Newfoundland." (*Direct U. S. Cable Co. v. The Anglo-American Telegraph Co.*, Law Reports, 2 Appeal Cases, 374.)

So it may be safely asserted that a certain class of bays, which might be properly called the historical bays such as Chesapeake Bay and Delaware Bay in North America and the great estuary of the River Plate in South America, form a class distinct and apart and undoubtedly belong to the littoral country, whatever be their depth of penetration and the width of their mouths, when such country has asserted its sovereignty over them, and particular circumstances such as geographical configuration, immemorial usage and above all, the requirements of self-defense, justify such a pretension. The right of Great Britain over the bays of Conception, Chaleur and Miramichi are of this description. In what refers to the other bays, as might be termed the common, ordinary bays, indenting the coasts, over which no special claim or assertion of sovereignty has been made, there does not seem to be any other general principle to be applied than the one resulting from the custom and usage of each individual nation as shown by their treaties and their general and time honored practice.

The well known words of BYNKERSHOEK might be very appropriately recalled in this connection when so many and divergent opinions and authorities have been recited: "The common law of nations," he says, "can only be learnt from reason and custom. I do not deny that authority may add weight to reason, but I prefer to seek it in a constant custom of concluding treaties in one sense or another and in examples that have occurred in one country or another." (*Questiones Jure Publici*, Vol. 1, Cap. 3.)

It is to be borne in mind in this respect that the Tribunal has been called upon to decide as the subject matter of this controversy, the construction to be given to the fishery Treaty of 1818 between Great Britain and the United States. And so it is that from the usage and the practice of Great Britain in this and other like fisheries

and from treaties entered into by them with other nations as to fisheries, may be evolved the right interpretation to be given to the particular convention which has been submitted. In this connection the following treaties may be recited:

Treaty between Great Britain and France. 2nd August, 1839. It reads as follows:

Article IX. The subjects of Her Britannic Majesty shall enjoy the exclusive right of fishery within the distance of 3 miles from low water mark along the whole extent of the coasts of the British Islands.

It is agreed that the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries, shall, with respect to bays, the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland.

Article X. It is agreed and understood, that the miles mentioned in the present convention are geographical miles, whereof 60 make a degree of latitude.

(HERTSLETT'S Treaties and Conventions, Vol. V, p. 89).

Regulations between Great Britain and France. 24th May, 1843.

Art. II. The limits, within which the general right of fishery is exclusively reserved to the subjects of the two kingdoms respectively, are fixed (with the exception of those in Granville Bay) at 3 miles distance from low water mark.

With respect to bays, the mouths of which do not exceed ten miles in width, the 3 mile distance is measured from a straight line drawn from headland to headland.

Art. III. The miles mentioned in the present regulations are geographical miles, of which 60 make a degree of latitude.

(HERTSLETT, Vol. VI, p. 416).

Treaty between Great Britain and France. November 11, 1867.

Art. I. British fishermen shall enjoy the exclusive right of fishery within the distance of 3 miles from low water mark, along the whole extent of the coasts of the British Islands.

The distance of 3 miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays, the mouths of which do not exceed ten miles in width be measured from a straight line drawn from headland to headland.

The miles mentioned in the present convention are geographical miles whereof 60 make a degree of latitude.

(HERTSLETT'S Treaties, Vol. XII, p. 1126, British Case App. p. 38).

Great Britain and North German Confederation. British notice to fishermen by the Board of Trade. Board of Trade, November 1868.

Her Majesty's Government and the North German Confederation having come to an agreement respecting the regulations to be observed by British fishermen

fishing off the coasts of the North German Confederation, the following notice is issued for the guidance and warning of British fishermen:

1. The exclusive fishery limits of the German Empire are designated by the Imperial Government as follows: that tract of the sea which extends to a distance of three sea miles from the extremest limits which the ebb leaves dry of the German North Sea Coast of the German Islands or flats lying before it, as well as those bays and incurvations of the coast which are ten sea miles or less in breadth reckoned from the extremest points of the land and the flats, must be considered as under the territorial sovereignty of North Germany.

(HERTSLETT'S *Treaties*, Vol. XIV, p. 1055).

Great Britain and German Empire. British Board of Trade, December 1874.

(Same recital referring to an arrangement entered into between Her Britannic Majesty and the German Government).

Then the same articles follow with the alteration of the words "German Empire" for "North Germany."

(HERTSLETT'S, Vol. XIV, p. 1058).

Treaty between Great Britain, Belgium, Denmark, France, Germany and the Netherlands for regulating the police of the North Sea Fisheries, May 6, 1882.

II. Les pêcheurs nationaux jouiront du droit exclusif de pêche dans le rayon de 3 milles, à partir de la laisse de basse mer, le long de toute l'étendue des côtes de leurs pays respectifs, ainsi que des îles et des bancs qui en dépendent.

Pour les baies le rayon de 3 milles sera mesuré à partir d'une ligne droite, tirée, en travers de la baie, dans la partie la plus rapprochée de l'entrée, au premier point où l'ouverture n'excédera pas 10 milles.

(HERTSLETT, Vol. XV, p. 794).

British Order in Council, October 23rd, 1877.

Prescribes the obligation of not concealing or effacing numbers or marks on boats, employed in fishing or dredging for purposes of sale on the coasts of England, Wales, Scotland and the Islands of Guernsey, Jersey, Alderney, Sark and Man, and not going outside;

(a) The distance of 3 miles from low water mark along the whole extent of the said coasts;

(b) In cases of bays less than 10 miles wide the line joining the headlands of said bays.

(HERTSLETT'S Vol. XIV, p. 1032).

To this list may be added the unratified Treaty of 1888 between Great Britain and the United States which is so familiar to the Tribunal. Such unratified treaty contains an authoritative interpretation

of the Convention of October 20th, 1818, *sub-judice*: "The three marine miles mentioned in Article I of the Convention of October 20th, 1818, shall be measured seaward from low-water mark; but at every bay, creek or harbor, not otherwise specifically provided for in this treaty, such three marine miles shall be measured seaward from a straight line drawn across the bay, creek or harbor, in the part nearest the entrance at the first point where the width does not exceed ten marine miles," which is recognizing the exceptional bays as aforesaid and laying the rule for the general and common bays.

It has been suggested that the Treaty of 1818 ought not to be studied as hereabove in the light of any treaties of a later date, but rather be referred to such British international conventions as preceded it and clearly illustrate, according to this view, what were, at the time, the principles maintained by Great Britain as to their sovereignty over the sea and over the coast and the adjacent territorial waters. In this connection the treaties of 1686 and 1713 with France and of 1763 with France and Spain have been recited and offered as examples also of exclusion of nations by agreement from fishery rights on the high seas. I cannot partake of such a view. The treaties of 1686, 1713 and 1763 can hardly be understood with respect to this, otherwise than as examples of the wild, obsolete claims over the common ocean which all nations have of old abandoned with the progress of an enlightened civilization. And if certain nations accepted long ago to be excluded by convention from fishing on what is to-day considered a common sea, it is precisely because it was then understood that such tracts of water, now free and open to all, were the exclusive property of a particular power, who, being the owners, admitted or excluded others from their use. The Treaty of 1818 is in the meantime one of the few which mark an era in the diplomacy of the world. As a matter of fact it is the very first which commuted the rule of the cannon-shot into the three marine miles of coastal jurisdiction. And it really would appear unjustified to explain such historic document, by referring it to international agreements of a hundred and two hundred years before when the doctrine of SELDEN'S *Mare Clausum* was at its height and when the coastal waters were fixed at such distances as sixty miles, or a hundred miles, or two days' journey from the shore and the like. It seems very appropriate, on the contrary, to explain the meaning of the Treaty of 1818 by comparing it with those which immediately followed and established the same limit of

coastal jurisdiction. As a general rule a treaty of a former date may be very safely construed by referring it to the provisions of like treaties made by the same nation on the same matter at a later time. Much more so when, as occurs in the present case, the later conventions, with no exception, starting from the same premise of the three miles coastal jurisdiction arrive always to an uniform policy and line of action in what refers to bays. As a matter of fact all authorities approach and connect the modern fishery treaties of Great Britain and refer them to the Treaty of 1818. The second edition of KLUBER, for instance, quotes in the same sentence the treaties of October 20th, 1818, and August 2, 1839, as fixing a distance of three miles from low water mark for coastal jurisdiction. And FIORI, the well-known Italian jurist, referring to the same marine miles of coastal jurisdiction, says: "This rule recognized as early as the Treaty of 1818 between the United States and Great Britain, and that between Great Britain and France in 1839, has again been admitted in the treaty of 1867." (*Nouveau Droit International Public*, Paris, 1885, Section 803.)

This is only a recognition of the permanency and the continuity of States. The Treaty of 1818 is not a separate fact unconnected with the later policy of Great Britain. Its negotiators were not parties to such international convention and their powers disappeared as soon as they signed the document on behalf of their countries. The parties to the Treaty of 1818 were the United States and Great Britain, and what Great Britain meant in 1818 about bays and fisheries, when they for the first time fixed a marginal jurisdiction of three miles, can be very well explained by what Great Britain, the same permanent political entity, understood in 1839, 1843, 1867, 1874, 1878 and 1882, when fixing the very same zone of territorial waters. That a bay in Europe should be considered as different from a bay in America and subject to other principles of international law cannot be admitted in the face of it. What the practice of Great Britain has been outside the treaties is very well known to the Tribunal, and the examples might be multiplied of the cases in which that nation has ordered its subordinates to apply to the bays on these fisheries the ten mile entrance rule or the six miles according to the occasion. It has been repeatedly said that such have been only relaxations of the strict right, assented to by Great Britain in order to avoid friction on certain special occasions. That may be. But it may also be asserted that such relaxations have been very many and that the constant, uniform, never contradicted, practice of concluding fishery

treaties from 1839 down to the present day, in all of which the ten miles entrance bays are recognized, is the clear sign of a policy. This policy has but very lately found a most public, solemn and unequivocal expression. On a question asked in Parliament on the 21st of February, 1907, says PITT COBBETT, a distinguished English writer, with respect to the Moray Firth Case, it was stated that, according to the view of the Foreign Office, the Admiralty, the Colonial Office, the Board of Trade and the Board of Agriculture and Fisheries, the term "territorial waters" was deemed to include waters extending from the coast line of any part of the territory of a State to three miles from the low-water mark of such coast line and the waters of all bays, the entrance to which is not more than *six miles*, and of which the entire land boundary forms part of the territory of the same state (PITT COBBETT Cases and Opinions on International Law, Vol. 1, p. 143).

Is there a contradiction between these six miles and the ten miles of the treaties just referred to? Not at all. The six miles are the consequence of the three miles marginal belt of territorial waters in their coincidence from both sides at the inlets of the coast and the ten miles far from being an arbitrary measure are simply an extension, a margin given for convenience to the strict six miles with fishery purposes. Where the miles represent sixty to a degree in latitude the ten miles are besides the sixth part of the same degree. The American Government in reply to the observations made to Secretary BAYARD's Memorandum of 1888, said very precisely: "The width of ten miles was proposed not only because it had been followed in conventions between many other powers, but also because it was deemed reasonable and just in the present case; this Government recognizing the fact that while it might have claimed a width of six miles as a basis of settlement, fishing within bays and harbors only slightly wider would be confined to areas so narrow as to render it practically valueless and almost necessarily expose the fishermen to constant danger of carrying their operations into forbidden waters." (British Case Appendix, page 416.) And Professor JOHN BASSETT MOORE, a recognized authority on international law, in a communication addressed to the Institute of International law, said very forcibly: "Since you observe that there does not appear to be any convincing reason to prefer the ten mile line in such a case to that of double three miles, I may say that there have been supposed to exist reasons both of convenience and of safety. The ten mile line has been adopted in the cases referred to as a practical rule. The transgression of an en-

encroachment upon territorial waters by fishing vessels is generally a grave offense, involving in many instances the forfeiture of the offending vessel, and it is obvious that the narrower the space in which it is permissible to fish the more likely the offense is to be committed. In order, therefore, that fishing may be practicable and safe and not constantly attended with the risk of violating territorial waters, it has been thought to be expedient not to allow it where the extent of free waters between the three miles drawn on each side of the bay is less than four miles. This is the reason of the ten mile line. Its intention is not to hamper or restrict the right to fish, but to render its exercise practicable and safe. When fishermen fall in with a shoal of fish, the impulse to follow it is so strong as to make the possibilities of transgression very serious within narrow limits of free waters. Hence it has been deemed wiser to exclude them from space less than four miles each way from the forbidden lines. In spaces less than this operations are not only hazardous, but so circumscribed as to render them of little practical value." (*Annuaire de l'Institut de Droit International*, 1894, p. 146).

So the use of the ten mile bays so constantly put into practice by Great Britain in its fishery treaties has its root and connection with the marginal belt of three miles for the territorial waters. So much so that the Tribunal having decided not to adjudicate in this case the ten miles entrance to the bays of the Treaty of 1818, this will be the only one exception in which the ten miles of the bays do not follow as a consequence the strip of three miles of territorial waters, the historical bays and estuaries always excepted.

And it is for that reason that an usage so firmly and for so long a time established ought, in my opinion, be applied to the construction of the treaty under consideration, much more so, when custom, one of the recognized sources of law, international as well as municipal, is supported in this case by reason and by the acquiescence and the practice of many nations.

The Tribunal has decided that: "In case of bays the 3 miles (of the treaty) are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration characteristic of a bay. At all other places the three miles are to be measured following the sinuosities of the coast." But no rule is laid out or general principle evolved for the parties to know what the nature of such configuration is or by what methods the points should be ascertained from which the bay should lose the characteristics of

such. There lies the whole contention and the whole difficulty, not satisfactorily solved, to my mind, by simply recommending, without the scope of the award and as a system of procedure for resolving future contestations under Article IV of the Treaty of Arbitration, a series of lines, which practical as they may be supposed to be, cannot be adopted by the Parties without concluding a new treaty.

These are the reasons for my dissent, which I much regret, or Question Five.

Done at the Hague, September 7th, 1910.

LUIS M. DRAGO.

BOOK REVIEWS.

Cases and Opinions on International Law. By Pitt Cobbett, M. A., D. C. L. (Oxon). Part I, Peace. 3d ed. London: Stevens and Haynes. 1909. pp. xxiv, 385.

The original edition of Mr. Cobbett's *Cases and Opinions on International Law* appeared in 1885 in a volume of 263 pages. The present, that is the third, edition of the work is composed of two volumes. The first part, dealing with peace, appeared in 1909.

The original work was highly regarded and has been extensively used as a text-book. It is believed that the third edition will prove even more useful to the student of international law, although perhaps it is too detailed for class-room purposes:

Mr. Cobbett's purpose, as explained in the preface to the original edition, was two-fold: First, to show that "a very large portion of international law rests on authority as trustworthy as that which commands the homage of the English lawyer," and "to bring out how much of the law of nations exists in this shape;" second, "to publish a selection of illustrative cases which may serve as a useful companion volume to existing text-books." In both of these purposes he was eminently successful. No one can read Mr. Cobbett's collection, either in its original or its present form, without recognizing as unjust the "tendency on the part of English lawyers to regard that body of custom and convention which is known as international law, as fanciful and unreal; as a collection of amiable opinions rather than as a body of legal rules." And few students of international law would now-a-days deny that "the great body of the rules comprising the maritime law of nations, together with many fundamental rules in other departments, may be found in the judgments and decisions of international tribunals, such as boards of arbitration and courts of prize, some of them presided over by judges fully as eminent as those of the common law. Even where such authority fails, it is still possible to draw on such sources as official documents and records, and opinions given by official jurists to their own governments on matters of international concern."

It is comparatively easy to insist that international law should be considered as an existing legal system and treated as such. It was a

genuine service to examine the reported decisions of English and American courts and show beyond the possibility of contradiction that international law has been recognized by tribunals of the highest repute as a branch of law "administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for determination." (*Paquette Habana*, 175 U. S. 677.)

In the preface to the present edition, the editor and author, for he appears in both qualities, maintains "that the law of nations is ascertained (*inter alia*) 'by judicial decisions recognizing and enforcing that law,' and such decisions, therefore, in so far as they purport to be founded on the law of nations, may be regarded, not only as authoritative within the limits of their respective systems, but as having a persuasive or evidentiary value in the courts of other states, or before international tribunals. Such decisions, moreover, serve to show how the law of nations is understood and applied in particular cases."

Admitting the correctness of Mr. Cobbett's contention and the service he has rendered to the study of international law by the publication of his Cases and Opinions, the question arises as to the method of selection and the manner of presentation.

The cases drawn on are largely of English and American origin, which gives to the collection a peculiar value to English-speaking students. Mr. Cobbett, however, has appreciated the value of decisions of courts of arbitration and commissions of inquiry in the statement and development of principles of international law, and in the third edition of his work has selected the most important of recent arbitrations, such as the Pious Fund arbitration of 1902 (pp. 23-27), the report of the international commission of inquiry in the North Sea incident of 1904 (pp. 27-30), the Alaska boundary commission of 1903 (pp. 96-104), the Bering Sea arbitration of 1893 (pp. 124-130), the Costa Rica Packet of 1897 (pp. 268-270), the arbitration between Chile and Peru of 1875 concerning the treaty of 1865 (pp. 314-317), and the arbitration between Great Britain, Germany and Italy and Venezuela of 1903 (pp. 339-342). In addition to these sources, he has drawn freely upon the state papers and inserted in the text important cases involving questions of law which were, however, settled by diplomatic negotiation without the interposition of courts of justice. The material at his disposal and brought into contribution is, therefore, extensive and well calculated to expose and develop the principles of law applied by nations in their intercourse and in the settlement of questions susceptible of judicial

determination. Mr. Cobbett has added to the selected cases extensive and very valuable notes of an historical and critical nature. As an example of the care and industry, learning and skill with which he has annotated a particular case and developed and applied the principles appertaining to the subject, may be cited the note to the case of the *Paquette Habana*, in which the nature and source of international law are discussed (pp. 4-15).

The manner of presenting the cases, which Mr. Cobbett has selected with great care and discrimination, is, in the opinion of the reviewer, subject to criticism, although it may be, after all, a question of individual taste or judgment. Mr. Cobbett has digested the statements taken from the original reports and in so doing has rendered the facts involved in the cases clear and understandable. He has, however, pursued the same method with the judgments, and instead of presenting them in the language of the judges delivering the opinions, he has summarized them, digested them, and presented them, with few exceptions, in his own language. Much space is no doubt saved by so doing, but a digest of the judgment rather than the judgment itself is given, and a paraphrase is presented rather than the language of the judge whose decision is at once the law and its source. Experience shows that the case itself is more valuable and illuminating than the syllabus, and sooner or later resort must be had to the text of the judgment. It is submitted that it would be better in the first instance to refer to the judgment and to present it in the language of the judge to the student, even although large portions must necessarily be omitted as irrelevant to the particular question at issue. The same criticism is applicable to the cases selected from the decisions of arbitral tribunals and to the statements of cases settled through the channels of diplomacy. The language of the adjudged case and of the minister of state is, it is submitted, infinitely more valuable than a digest, however accurate or carefully made.

The guiding purpose of the first edition was to furnish "a useful companion volume to existing text-books." The purpose of the third edition is the same, and Mr. Cobbett has repeatedly referred to the opinions of writers of authority and has annotated his work with references to the leading text-books on international law, thus rendering the volume very valuable to the student.

Mr. Cobbett is a firm believer in arbitration and looks forward to the day when a permanent international court of justice may be estab-

lished and do justice between the nations. He confesses his faith in arbitration and its future not merely by cases selected from tribunals of arbitration, but in various passages in the notes, and in the appendix he prints the Final Act of the Second International Peace Conference, the Convention for the Peaceful Settlement of International Disputes, the Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, and the Draft Convention relative to the Creation of a Court of Arbitral Justice.

The nature and extent of the volume are shown by the table of contents: The nature and sources of international law, pp. 1-15; the relation of international law to English law, and the question of treaties, pp. 15-22; international courts of arbitration and commissions of inquiry, pp. 23-40; international persons (states, semi-sovereign states, belligerent communities), pp. 41-68; succession in international law, pp. 68-76; plenary representation of states, pp. 76-82; acts of state in international law, pp. 83-86; proceedings by and against foreign states, pp. 86-91; privileges of sovereigns or heads of foreign states, pp. 92-96; state territory and boundaries, pp. 96-115; navigable rivers of a state, pp. 116-124; the freedom of sea, pp. 124-132; territorial waters (the littoral sea; gulfs, bays and inland seas; straits and waterways, natural and artificial), pp. 132-153; rights of fishery, pp. 153-162; extraterritorial action, pp. 162-165; self-defense and protective jurisdiction on the high seas, pp. 165-170; state membership (nationals by birth, nationals by adoption, loss of national character and its reacquisition), pp. 170-196; rights and liabilities of aliens in time of peace, pp. 196-205; domicile, pp. 206-212; criminal jurisdiction and law of a state (territorial, extraterritorial), pp. 212-227; civil jurisdiction and law of a state, pp. 227-234; extradition of criminals, pp. 235-245; extraterritorial communities, pp. 246-251; public vessels and armed forces of a state (ships of war, public vessels other than ships of war, persons on board public vessels), 251-264; rights and duties of public armed vessels on the high seas, pp. 264-268; private vessels on the high seas, pp. 268-277; private vessels in foreign ports and territorial waters, pp. 277-283; piracy and analogous acts, pp. 283-287; insurgents carrying on war by sea, pp. 287-290; the slave-trade, pp. 290-293; agents of a state in its external relations, pp. 293-306; diplomatic agents and consuls, pp. 307-314; treaties and international agreements, pp. 314-321; termination of treaties, pp. 321-328; interpretation of treaties, pp. 328-

333; international delinquencies and methods of redress short of war, pp. 334-348.

This outline of the contents of the leading cases, as well as the statement of the treatment of the various subjects, is sufficient to show the value of Mr. Cobbett's contribution to international law; and the reviewer, in conclusion, expresses the hope that the present edition of this excellent work may interest readers in international law as the first edition of the original work induced him to devote himself to its systematic study.

JAMES BROWN SCOTT.

A Valedictory Retrospect (1874-1910). Being a Lecture delivered at All Souls College, June 17, 1910, by Thomas Erskine Holland, K. C., D. C. L., F. B. A., Chichele Professor of International Law and Diplomacy.

This lecture, a pamphlet of twenty-three pages, summarizes the activities of an Oxford professor who has exercised a commanding influence in the field of international law. The American Society of International Law has acknowledged this by making Professor Holland one of its first honorary members. The thirty-six years of service reviewed in this lecture cover a period of very rapid development of law in international relations. Professor Holland has often made known to the world his opinions upon matters which were disturbing the minds of statesmen. A glance through the collection, "Letters to the *Times* on War and Neutrality" (1881-1909), will show that Professor Holland's influence has not been "bounded by the precincts of the University." Professor Holland's great service in focusing attention upon the important contribution of Alberico Gentili to the law of war has justly received recognition throughout the world. As an active member of the *Institut de Droit International*, serving upon many committees, Professor Holland has done much to mould international law. Always influential with and often the official representative of the British Government in matters involving international law, Professor Holland has served well his state as also his University. American students of international law would certainly pay respectful homage to one who has contributed so much to "the science which it has been his business to study and to teach."

GEO. G. WILSON.

The New Cyneas of Emeric Crucé. Edited with an introduction and translated into English from the original French text of 1623 by Thomas Willing Balch. Philadelphia: Allen, Lane and Scott. 1909. pp. xxxi, 363.

The remarkable work of Emeric Crucé has had a curious career. Published in 1623, known to Leibniz, as appears from a letter addressed to the Abbé Saint-Pierre (Introduction, p. xxii), it disappeared from sight until a copy of it was picked up by Charles Sumner's brother and bequeathed by the latter in 1874 to Harvard College, and was reintroduced to the world by the distinguished Belgian publicist, M. Nys, in 1890. The very name of the author was unknown until M. Nys identified him as Emeric Crucé and enrolled him among the list of the pacifists who deserve the grateful remembrance of mankind. One copy of the work is in the National Library at Paris and was consulted by M. Nys. Another copy is in the library of Harvard University. A third copy is thought by M. Nys to be in existence.

Mr. Balch, who published a brochure on Emeric Crucé in 1900, has had the happy inspiration to publish the original text of the *Nouveau Cynée*, and to accompany it, page by page, with an English translation. The French is therefore at the disposal of scholars and the English translation within the reach of those who may be unwilling or unable to read the somewhat difficult French of 1623.

Mr. Balch has prefixed to the volume an introduction in which he states what is known of the author and supplies a very brief but interesting synopsis of the work.

The name is peculiar but significant, for Cyneas, as related by Plutarch in his *Life of Pyrrhus*, was an orator and favorite of Pyrrhus whose ambition it was to conquer the known world, after which he expressed an intention to take his ease, to drink and be merry. Cyneas regarded the conquering of the world as a somewhat exorbitant price to pay for the ease, drink and making merry, and suggested to his royal master that, if that be the end of his toils, there is nothing to hinder "us from drinking and taking our ease now when we have already those things in our hands, at which we propose to arrive through seas of blood, their infinite toils and dangers, their innumerable calamities, which we must both cause and suffer."

Crucé is the modern Cyneas and counsels the princes, to whom his work was especially dedicated, to cultivate peace, to eschew war, and to settle their controversies by peaceful means, to-wit, arbitration. Crucé

did not limit his plan to the Christian countries of Europe, nor did he have any particular desire to enhance the station of any country, a purpose evident in the Great Design of Sully and the Perpetual Peace of Saint-Pierre. His desire was to do justice to all men and to maintain peace in all quarters of the world. "Why should I," he says, "a Frenchman, wish to harm an Englishman, a Spaniard, or a Hindoo? I can not wish it when I consider that they are men like me, that I am subject like them to error and sin and that all nations are bound together by a natural and consequently indestructible tie, which ensures that a man can not consider another a stranger, unless he follows the common and inveterate opinion that he has received from his predecessors." (Intro. xiii.) He recognized the necessity of commerce and that in order to enjoy the benefits of commerce nations must have peace. "What a pleasure it would be," he says, "to see men go freely here and there, and to hold intercourse with one another, without any scruples of country, ceremonies or other such diversities, as if the earth were as it really is, a dwelling place common to all!" (Intro. xii.) To induce universal peace he proposed, to quote from Balch, "a universal union that should include even Persia, China, Ethiopia, the East Indies, the West Indies, indeed all the world. A delicate question was, how to arrange the order of rank and precedence. He suggested as a possible solution of this difficulty, the following order, and some of the reasons for it:

"First: The Pope, in part out of respect to ancient Rome.

"Second: The Sultan of the Turks, because of the 'majesty, power, and happiness' of his Empire, and also on account of the memory of the ancient Eastern Empire, of which Constantinople was the capital.

"Third: The Christian Emperor.

"Fourth: The King of France.

"Fifth: The King of Spain.

"Then the claims of the Kings of Persia and China, Prester John, the Precop (sic) of Tatar and the Grand Duke of Muscovy, must be arranged.

"Next the importance and order of precedence of the Kings of Great Britain, Poland, Denmark, Sweden, Japan and Morocco, the Great Mogul and the other monarchs demanded attention.

"Among other expedients, Crucé proposed to give the first place to the first comer, or to the oldest, or again *à tour de rôle*." (Intro. xix-xx.)

In this capacity Crucé appears as a partisan of federation. He was also a partisan of arbitration as a means for the peaceful settlement of

international disputes, and he suggested, in order to render arbitration efficacious, an international court at Venice before which any powers in disagreement should appear in the person of an ambassador to plead their cause. To quote again from Balch, "Crucé proposed that all the principal sovereigns of the world should always have at Venice ambassadors to represent them in a general assembly of all the nations of the world: and that when any two sovereign potentates should disagree, that then instead of settling their difference of opinion by resorting to arms and war, they should appeal to the judgment of this assembly sitting at Venice, each contestant presenting his side of the case through his own representative in Venice. In this general world-wide assembly, Crucé wished to include the great republics. But the ambassadors of the republics were not to have a vote except in case of a tie. 'And if the opinions of the assembly of the Princes or their Deputies were found to be divided into two parts and of equal weight, as may happen,' he says 'the Deputies of the Republics who would have a deliberative voice could then be called, in order to finish the debate by the counterbalancing weight of their suffrages.' Thus in the rough we find the present Hague International Court sketched out." (Intro., pp. xvi-xvii.)

Without entering into details, enough has been said to show the general interest of this remarkable work, and Mr. Balch deserves the gratitude of students and scholars for placing it within reach in its original and translated form. The enterprise has been a labor of love, for Mr. Balch has printed the volume in luxurious form and at his own expense and offers it to the public at cost.

JAMES BROWN SCOTT.

Lo Stato Soggetto Del Diritto Internazionale. By Dr. Andrea Rapisardi-Mirabelli. Pisa: Direzione Dell' Archivio Giuridico. 1909, 89 pp. L. 4.

The present study is, as we are informed in a foot-note, intended by the author to form one among a series dealing with "Fundamental questions of international law."

"The State as the subject of International Law" would hardly appear to furnish a theme capable of much elaboration. Indeed, the author opens by the declaration that the great majority of the definitions of international law define or assume the state as its only subject, and that from this point of view he has merely to deal with one or

two apparent or suggested exceptions. A place has been claimed in this sphere for the individual man as the possessor of certain human or natural rights. Again, an exceptional position has been conceded to the Papacy in the international community. Both of those suggestions are disposed of very summarily. The third proposal which is dealt with is a very curious one supported by certain eminent students of the Italian school of international law, namely that the *nation* should be substituted for the state as the subject of the science. We have here apparently, on what we generally assume to consider as purely scientific ground, an offshoot of theory which is largely referable to the modern history of Italy and the supreme importance which the idea of nationality as against mere political organization acquired in that history.

It is a useful reminder that in none of those subjects in which human will and sentiment are involved is a *purely* scientific point of view possible.

A somewhat more extended consideration is given to the condition of a party to civil war, the belligerency of which has been recognized by neutrals. This is in fact recognition as a state, though its effects are for the time limited to certain relations only—those namely which are connected with the laws of war and of neutrality.

Having rejected decisively all the various heresies propounded, and having reaffirmed his acceptance of the doctrine that the states and only the states are subjects of international law, the author proceeds to a historical review of the varying conceptions of the state in that character as it appears in the several schools from the time of Grotius, the father and founder of the science, till our own day.

This historical thread of theory forms a subject well calculated to appeal to Dr. Rapisardi-Mirabelli, and he follows it out at some length. It is enough to say that he distinguishes two main opposing schools of thought, both branching off from their root in Grotius, both reaching once more a kind of unity or reconciliation in the modern eclecticism. The naturalistic school identifies the law of nations with the law of nature—and indeed a very problematic and supposititious state of nature. Against this we have the positive or historical school directing attention rather to the facts and international relations as they exist in practice, supplying a much needed criticism of the tendency towards extreme individualism which existed in the naturalistic school, and gradually forcing the course of the science back into safer ways.

Eventually the great conception of the community of states arises, and with it that of the personality of each several state as a member of that community; and this deeper idea of personality, to which legal rights and obligations can attach takes the place of uncompromising individuality, which appeared to risk loss and self-negation with every concession to the equal and independent individualities around it.

The state as a person then, the subject of rights and no longer, whether as territory or people, the mere object of the rights of a sovereign or superior, is the great discovery of the school of Grotius in the field of theory, the achievement mainly of the French Revolution in practice.

The personality which is here in question, however, is to be limited to a purely legal conception, existing in virtue of the possession by the state of special interests and the will to realize them. It is a creation of law, and this creation which is at the basis of all international relations is objectified in the special and singular case of the recognition of a new nation entering for the first time into relations with existing communities. In virtue of this recognition it steps from a condition of existence in fact to one of existence in law. Here, according to the author, is the true root and foundation of all international law.

The last pages of this study are dedicated to the bearing of the previous argument and conclusion on the systemization of international law. If the foundation is legal personality, and the state as the subject of rights, the classification based on the so-called fundamental or absolute rights of the state, which are practically such as it can exercise apart from and independently of the other members of the international community, is no longer admissible. International law is the law of the reciprocal relations between nations, and it cannot cover any ground on which these relations are non-existent.

The mode of treatment adopted by Dr. Rapisardi-Mirabelli and his conscientious endeavor to present the varying theories on the subject under discussion, tend to make it difficult to retain a firm hold of the logical thread, and to deprive his work of some part of the interest which ought to attach to it. It is not impossible that some compression, an effort to throw into better relief the views which he maintains, and more rigorous exclusion of what does not have direct bearing on the line of argument, would impart greater value to his studies, and it would certainly make them easier reading.

JAMES BARCLAY.

The Effect of War on Contracts and on Trading Associations in Territories of Belligerents. By Coleman Phillipson, M. A., LL. D. London: Stevens and Haynes, 1909. pp. 114.

The author of the present monograph is favorably known by his two studies in international law, published in 1908 and reviewed in this JOURNAL, Vol. II, p. 722. The volume now under review is, its author states, the Quain Prize Essay for the year 1908 in the Department of Law at University College, London. The original essay, we are told, has been somewhat enlarged and brought up to date, and the very important conclusions of the International Naval Conference held at London in 1909 have been incorporated in the text.

International law is such a large and comprehensive system that an author does well and is to be commended who seeks out some important topic and treats it at considerable length. The appearance of monographs on various important phases of international law would not only inform the general reader and the student of international law, but would lighten the burden of him who seeks to present the practice of nations in systematic form. The future of international law is with the monograph.

As regards the book under review, it is a pleasure to note that Mr. Phillipson has brought to his task a knowledge of the Continental literature as well as of the leading English and American treatises, and that he has examined the effect of war on contracts in the light of Continental and Anglo-American theory and practice. He has carefully read the leading English and American cases on the subject, has analyzed and distinguished them and stated in clear and concise terms the principles of the law to be deduced from them. The theories of nationality and domicile are carefully considered and the situation of trading companies in enemy territory is examined not only on principle but in the light of actual cases, with particular reference to the decisions arising from the recent war in South Africa.

The reviewer has read Mr. Phillipson's monograph with both pleasure and profit, and he commends it to the general reader and the student of international law in the belief that they will likewise be interested and informed by its perusal.

JAMES BROWN SCOTT.

Annuaire de la Vie Internationale. Fondé par A. H. Fried et publié par les soins de l'Institut International de Bibliographie et de l'Institut International de la Paix. Seconde série. Volume I. 1908-1909. Brussels Office central de Institutions Internationales, rue de la Régence, 3 bis. 8vo, 181+1370 pages. 20 francs (imported \$5).

This is one of the most notable volumes of information appertaining to international law published in many days. It is an outgrowth of an annual of the same name founded by the well-known pacifist enthusiast and writer, Alfred Hermann Fried of Vienna, and published in *duodecimo* volumes of 159, 314 and 254 pages respectively in 1905, 1906 and 1907 by the Institut International de la Paix of Monaco. It has grown immensely under its new auspices, the Central Office of International Institutions of Brussels, and Mr. Fried now has associated with him as an editorial committee Henri La Fontaine and Paul Otlet, both diligent students and pacifists.

The extent to which international co-operation has advanced is doubtless the most remarkable fact borne in upon any one who looks into this volume. The index contains about 675 separate entries, very few of which are duplicates.

It is the introduction of 181 pages that contains the summarizing information. It consists of three essays: "The Science of Internationalism" by Alfred H. Fried, "International Organization and International Associations" by Paul Otlet and "Documentation and Internationalism" by Henri La Fontaine.

The Annual of the International Life is unique in its sponsors and its editing. At Brussels, it seems, some 42 different international unions, associations, institutes and commissions have permanent bureaus. These in 1906 organized the Central Office of International Institutions and the present Annual is virtually its first fruit, although its Bulletin is now appearing regularly and the International Exposition at Brussels, which opened in May, is also one of its undertakings. It aims to give all possible aid to international organizations, to coordinate their work, to encourage new formations, to organize congresses and, in connection with the International Institute of Bibliography, to build up a great library of internationalism.

This latter task is at once difficult and important. The Annual necessitated the consultation of over 1500 works and because organizations of the character it considers are usually private in large measure their publications are hard to obtain. "In this respect," says M. La

Fontaine, "the international institutions and associations have the greatest interest that their publications be speedily consigned to oblivion. They have often occasioned considerable expense and by lack of sufficient publicity they remain piled up at one or another printer's, secretariat or presidency and end by being sold as old paper or destroyed, to the great detriment to the ideas from which they have resulted." Nevertheless, the task has been undertaken.

As a reference book the present product has several things to commend it which might be profitably followed in principle by other publications. As is well known, the chief difficulty in consulting an annual publication whose contents from year to year supplement previous information is the bothersome necessity of referring backward to numerous indices. This handicap has been overcome in several ways, two of which are the republication of an index to the special features of earlier volumes and another is the looseleaf encyclopedia method. M. La Fontaine, however, assures the reader that by resort to the system of decimal classification adopted for cataloguing by the International Institute of Bibliography this annual will be immediately accessible in all its parts to the inquirer.

According to the Institute's scheme all books may be classified under ten heads: general, philosophy, religion, social science, philology, pure science, applied science, fine arts, literature, history and geography. A book's number is determined by re-application of this list and its rubrics as many times as necessary. Thus, the first part of this work has uniformly the major rubric 341, the 3 placing the subject under social science, the 4 confining it to the fourth arbitrary subdivision under that branch and the 1 defining it as the philosophical segment thereunder. For closer classification a point is used and the figures similarly built up. Thus the portion devoted to the Bureau of the International Union of American Republics bears the rubric 341.25. The proper rubric is printed at the top of every page opposite the regular pagination, and by this device it is intended to give the reader constantly the cue for further investigation. But the remedy may be worse than the disease, considering that it takes 2250 pages fully to elucidate this system of classification in its manual.

M. La Fontaine also suggests that as persons interested in the information contained in the volume may desire to extract sections from it and bind them separately, the editors have provided for such a desire by beginning each notice on the right-hand page, to insure against

the possibility of mutilating other notices in the process. He assures the reader that this care will be appreciated, for he promises that information in succeeding volumes will supplement rather than duplicate what is now published.

Of course, the value of these ideas in publication remains to be proved, but they are evidently worth explanation.

What is internationalism, to which so large a work is devoted? Mr. Fried attempts to answer the question in his essay. "It has as a base," he says, "the idea of international cooperation viewed through its causes and substance. * * * Internationalism primarily stands for aid in the progressive development of nations, in the development of the vital value and grandeur of each nation; it does not belittle one's fatherland, but especially assures to it, by the accumulated effect of work, by the regular exchange of production, a greater well-being, a greater security. Indeed, modern internationalism is a patriotism, elevated, ennobled."

He finds two different tendencies toward this end, one conscious, the other unconscious. The attainment of the results that he considers as without any direct intention is multitudinous. The train that runs from one town to another within a country binds indirectly the cities of different countries. The agent who handles the traveler's baggage in Switzerland works in international accord with his fellow in St. Petersburg or Archangel. Imitation of the most diverse institutions and inventions makes the street car and the arc light the common property of American and Australian, European and Chinese.

Conscious internationalism manifests itself in organizations founded with a definite purpose. They consist of the representatives of all countries united for a common end and either create a permanent organization with fixed seat and central office or convene at intervals for conferences or other gatherings. Likewise, they are divided as official, installed by the governments themselves, or private, or mixed.

Paul Otlet's study of "International Organizations and the International Associations," although laying too little stress on the official unions, is a valuable collective study of this modern phenomenon of cooperation. He aims to summarize and compare, and the result should prove exceedingly important to those intending to form such associations, to students and to all who take a keen interest in the betterment of the world. His study is a fairly complete analysis of the movement of internationalism.

He tells us, for instance, that from 1840 to 1860 there were but 28 conferences and congresses, while in the single decade 1901-1910 there were 790, the total for the period since 1840 reaching the remarkable figure of 1977. Fifty-two that he knew of are scheduled for this year, but as the average of such meetings since 1904 has been over 100, the figure is clearly inaccurate. The number of members varies greatly, from ten or a dozen in official congresses where nations alone are represented up to 8000 and 9000 at the Congress of Applied Chemistry. To complete the statistics he finds that there are 37 official unions with bureaus, such as the Universal Postal Union and the International Institute of Agriculture, and 112 private associations of international scope in existence.

M. Otlet confines himself mostly to digesting facts, and is more successful in that effort than when he expresses opinions. One of the few of these in his essay of 137 pages is this: "The task of the future is to realize, in a world constitution, a just equilibrium of powers between professional, economic and scientific specialties represented by international associations and the ethnic and territorial generalities represented by states." Which would be a better expression of purpose were it not offset by a note discussing the possibility of that improbability, a world constitution.

The writer attempts a laudable circumscription of the term international, which he would deny to such organizations as American labor unions which arrogate it because there is a branch in Canada. By the same token he objects to a purely national combination with a purpose of studying a specific subject taking the title. He would have international mean worldwide, "omnination" or universal and would like to see lesser organizations apply to themselves such terms as binational, tri-national and quadri-national. In other words, he is striving for a scientifically accurate vocabulary of internationalism, and the intention shows itself in many portions of his work. In the same way he says "the title of conference (as opposed to congress) has been specially reserved to private meetings by invitation and diplomatic gatherings."

As one goes through his pages the extreme diversity of these associations, which are practically unknown because heretofore unstudied in sufficient quantity, is borne in on the mind. Some of them have grown up by accretion, others have simmered down from a hyperbolic idea. Some have been the result of a great world necessity or a generally felt

need, while others, as the Institute of Agriculture, have sprung from the efforts of individuals, and the American David Lubin in this instance is given full credit. Their whole history, however, is separable into three stages. The idea of a general scientific congress was of German origin and was evolved in 1823 and from then until 1864 the gatherings were private. From then until 1895 the idea was taking shape and many organizations, both private and official, were formed. This was the casual period, and is distinguished from the later years by the lack of official cooperation toward private ends. The later period has been much more prolific and the nations have lent aid and fostered the formations to a very large degree. This is illustrated by even a casual reference to the *Congressional Record*, almost any recent volume of which will show the presentation of resolutions to invite this or that congress to meet in an American city and perhaps carrying an appropriation for entertainment of the members.

One of the most interesting questions here brought up is the juridical regime affecting such combinations. What right, it may be asked, has an association with its central office in Berlin to exist and act in the United States, and would the privileges it assumes in peace be retainable in war? Aside from the difference in commercial purpose, the situation varies little from that set up by a great company with many branches. Should the association receive any international courtesies by reason of its nature, should it be recognized as a corporation and what elements should enter into its make-up to insure to it proper privileges?

These questions may now only be asked, for up to the present there "exists in no national legislations nor in international law juridical dispositions proper to international associations." The same can scarcely be said of official unions, whose status is invariably settled by the conventions forming them and which naturally partake of the general exemptions and privileges accorded to the departments of a state. It is provided that their mail matter be franked through all countries signatory to the constituent treaties and in various ways they are granted concessions due to their origin.

The problem, however, of establishing a method of general control and of guaranty of privileges proper in such cases remains almost in toto. M. Otlet cites a few instances in which recognition may be secured.

In France, he says, international associations — and this word, be it

noted, is properly applied only to private organizations — may be recognized establishments of public utility. He refers to the Bureau of Weights and Measures, itself an official combination, so that he has probably stretched a point, even if the law happens to be broad enough to cover his statement.

Switzerland, however, provides that associations may obtain civil personality under the terms of Article 716 of the federal code of obligations and be inscribed on the commercial registry, and it seems that the Universal Society of the White Cross, which wages a campaign against tuberculosis, cancer, social maladies, alcoholism and alimentary and pharmaceutical frauds, has done so.

Belgium's parliament in the sitting of the Chamber of July 26, 1907, received a project of law having for its object the civil personification of associations of an international character. It was specially devoted to scientific societies and a report of it was made by a special commission through M. Thibaut. The project was in 18 articles and gave the utmost liberty of action and the right to receive gifts and legacies. M. Otlet does not say what fate the project encountered.

It should also be noted that in some cases of official unions the economic action thereof has been intrusted to particular governments. The ministry of foreign affairs of Belgium conducts the Bureau for the Publication of Customs Tariffs, to which the United States contributes an annual quota of about \$1,365 and which from April 1, 1891, to November 1, 1909, had published and translated 407 tariffs and 1587 supplements, together forming a collection of 85 volumes of an average of 900 pages, or 75,000 pages.

Other legal questions may arise and that there is no evidence that any of them have come to judgment certainly speaks well for the high purposes of those multifarious persons who have gathered themselves together to advance a cause regardless of mere boundaries. One such difficulty has come up in the form of a question in Italy, which wants to know whether the officials of the International Institute of Agriculture should be taxed on their revenue. The personal responsibility of a member of a private association for his engagements relative to indebtedness and social charges has been dealt with in the regulations of the White Cross Society, which provide that the treasurer may disburse funds only with the written consent of two members of the General Assembly, or executive committee of the Society.

The Annual of the International Life is more of a revelation than anything of the kind usually is. Valuable as a reference work it should prove to be, but it ought to serve its cardinal purpose in contributing to the thesis of Andrew Carnegie and Alfred H. Fried that the world is in these days too closely bound together by commercial and intellectual ties to make war tolerable.

Its publishing sponsors are engaged in an attempt to consolidate and co-ordinate the work of the private associations centered at Brussels, and their book should go far toward proving the value of the effort. There is scarcely a field of human activity, beneficial or otherwise, that has not its organization, pro or con. No one had the demonstration of this fact in hand previous to the issuance of this publication.

DENYS P. MYERS.

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